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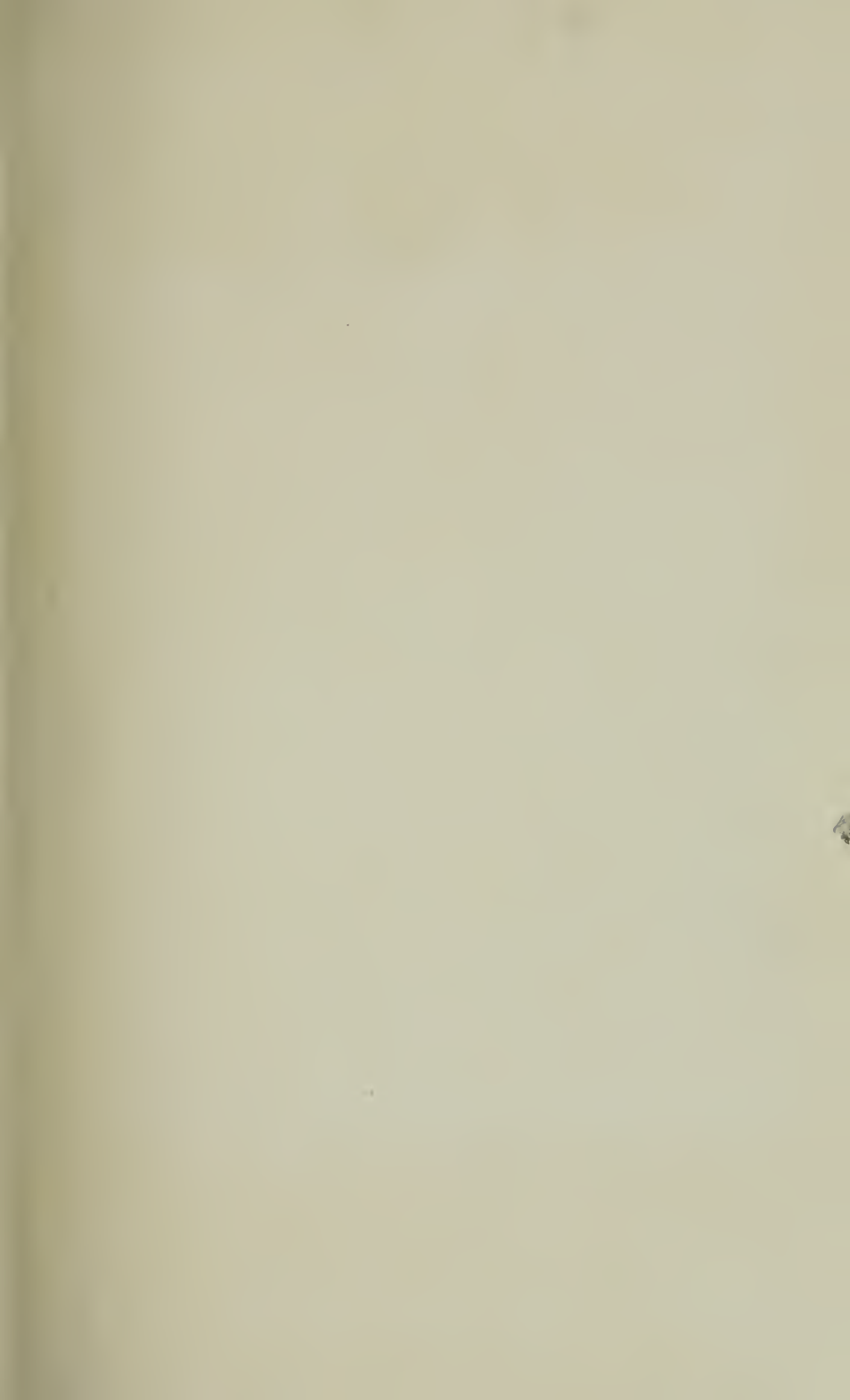
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2567
Nos. 11,519 and 11,880

IN THE
United States Court of Appeals
For the Ninth Circuit

See vol. 7460

UNITED STATES OF AMERICA,
vs.
ARROW STEVEDORING COMPANY (a corporation),
Appellant,
Appellee.

UNITED STATES OF AMERICA,
vs.
ARROW STEVEDORING COMPANY (a corporation),
Appellant,
Appellee.

On Appeals from the District Court of the United States for the
Northern District of California, Southern Division.

REPLY BRIEF FOR THE UNITED STATES.

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REPLY BRIEF FOR THE UNITED STATES.

PRELIMINARY ANALYSIS.

The United States has suffered a loss by being compelled to discharge decrees against itself because of the failure of Arrow Stevedoring Company to properly open and secure a hatch cover on the USS Edge-

combe. The case thus presents the question of Arrow's liability to the United States as a result of Arrow's negligence in the performance of its contract to carefully and properly unload a government vessel, including the opening and closing of her hatches necessary therefor.

There is a contract of indemnity implied by law in favor of the party employing a contractor to perform services whenever the contractor's negligence imposes loss or damage upon him. *Dunn v. Uvalde Asphalt Paving Co.* (1903), 175 N.Y. 214, 217-218, 67 N.E. 439. Arrow can escape liability under this implied contract only by proving either that it did not contract to do the work or that the express terms of the contract negative the ordinary implied contract to indemnify the United States.

By the terms of the contract, as well as the actual facts of this particular case, the Government turned over to Arrow the exclusive control of the work of unloading and of the opening of the hatches being unloaded. No government personnel supervised the work of opening the hatches involved or the unloading of their cargo and no government employee was present either when Arrow's men raised the hatch cover and left it open without fastening it safely, or when Arrow's foreman put his men to work beneath the improperly fastened cover with the result that it fell, injuring libelants.

Evidence was given of a common practice of ship's personnel to aid the stevedores in opening the hatches. That practice was not followed in this case and, in

view of the contract, it seems probable that if it had been the loaned servant doctrine would apply and any negligence of ship's personnel in performing Arrow's work of opening hatches must be attributed to Arrow, the contracting stevedore to whom the Government had delegated that work, and not to the United States which had employed Arrow to do it. Cf. *Anderson v. Standard Oil Co.* (1909), 212 U.S. 215, 220-225; *Denton v. Yazoo RR. Co.* (1932), 284 U.S. 305, 308. Even if the loaned servant rule did not apply and the ship's personnel had in fact undertaken to open and secure the hatch covers, this action of ship's personnel could not amend the contract so as to relieve Arrow from its contractual undertaking to properly and safely open and secure the hatch covers. It was Arrow's contractual duty in all events to see that this was safely done and while the ship's personnel might aid Arrow, the latter could not redelegate to the ship's officers its contractual duty to see that all was safe. Such a redelegation would be an amendment of the contract which could be effected only by the contracting officer in writing and with the formalities prescribed by the contract.

By the terms of the contract relating to "Liability and Indemnity" the ordinary implied right of indemnity is expressly declared.¹ Arrow is to indemnify the Government whenever it is at fault; the Government is to bear the loss when the fault is on its side. No provision is made for the case where each is at fault

¹The provision involved is Article 26 of the original contract, Article 21 of the amended contract in effect at the time of the accident. There is no difference.

but the parties are left to the differing rules of the common and maritime law, whichever is applicable in the circumstances of the case. Where the common law applies, the Government is entitled to indemnity under the rule of *Washington Gas Light Co. v. District of Columbia* (1896), 161 U.S. 316. Where, as here, the accident was on navigable waters, the law maritime applies and the Government is equally entitled, if appropriate, to contribution. *Portel v. United States* (S.D. N.Y.), 1949 A.M.C. 487, 491; see *American Stevedores v. Porello* (1947), 330 U.S. 446, 458.

SUMMARY OF THE PARTIES' CONTENTIONS.

The fundamental issue of the case is whether anything in the conduct of the parties and the provisions of the contract regarding "Liability and Indemnity" operates to relieve Arrow of liability to the United States under the implied contract of indemnity for Arrow's failure properly and safely to fasten open the hatch cover as it contracted with the Government to do.

To escape liability Arrow contends that: (1) It called upon the ship's officers to perform its contractual duty to see that the hatches were safely opened and they did not refuse but failed to do the work properly; (2) It is released because the Government's decision not to appeal the decrees in favor of libelants establishes not merely the liability of the United States to libelants but its sole responsibility, exclusive of Arrow, for their injury; (3) It is exonerated by the

the United States to furnish libelants a safe place to work being non-delegable, the United States was liable to them for Arrow's failure to perform its contract properly and safely to open and secure the hatch covers; (3) Arrow's contractual duty to perform its work safely is paramount and the clauses as to indemnity mean that Arrow is never relieved of liability for breach of its duty properly and safely to open and secure the hatch covers, but is relieved of liability where, despite its proper performance of its contract, loss or damage results entirely without its fault and solely by reason of latent defects; (4) the Longshoremen's Compensation Act has no effect on the liability of Arrow to the United States; and, finally, (5) Arrow contracted to procure compensation insurance in the standard form by which its liability in the present case was insured and further contracted that the subrogation of its underwriter to the claim of the injured libelants was waived in all cases.

ARGUMENT.

I.

THE CONTRACT REQUIRED ARROW TO OPEN THE HATCH AND SAFELY FASTEN THE HATCH COVER AND DID NOT PERMIT IT TO RE-DELEGATE THIS DUTY TO THE SHIP'S PERSONNEL.

There is no merit whatever in Arrow's arguments that the sole proximate cause of the accident was the disputed circumstance that the locking device on the hatch cover could not be successfully operated by Arrow's men and that Arrow was not negligent in

sending its men to work under the hatch cover once it had told the ship's officers that Arrow's men were leaving the cover open in an unsafe condition. The primary responsibility of Arrow for failing to lash the cover or else keeping its men out of that hatch is evident. This reckless breach of Arrow's contractual duty was proximate in time and the United States was not bound reasonably to expect it.

This is not a case where Arrow had properly and safely fastened the hatch cover and because of a latent defect the locking device broke and the cover fell. In such a case, admittedly the defect would be the sole proximate cause of the accident. But that is not this case. Here the breach of Arrow's contractual duty to open and fasten the cover safely caused the loss and damage. And the United States is entitled to recover the loss it sustained by Arrow's breach.

Arrow makes much of the "unsatisfactory character" of the hostile testimony of its employees when the Government was compelled to call them as the only eyewitnesses. It refers to its employees throughout as the "Government's own witnesses" and disregards their disposition toward the parties litigant. We submit that their hostility is natural. All testimony concerning the actual opening of the hatch cover by Arrow's men, their inability to properly secure the cover in the open position, and the circumstances of its fall could be obtained only from employees of Arrow. Reading the record shows they were, not unnaturally, disposed to favor Arrow and to put the Government in the worst light possible. The only testimony by government personnel was that of Herbert

Carnes, boatswain's mate, second class, on the Edgecombe, who only saw the cover before it was opened and after it had fallen and could only testify that materials were at hand to lash the cover safely and that his men could have secured it safely by proper use of the locking devices.

In the face of these facts, Arrow's insistence upon the "unsatisfactory" character of the testimony of its employees when testifying as "the Government's own witnesses" seems to mean that their refusal to disregard their own interest and put all possible blame on Arrow renders even their grudging concessions against their employer unworthy of belief. But Arrow admits that in fact its men opened and failed to secure the hatch cover safely: "The stevedores of the night shift opened the hatch cover and secured it as well as they could"—with the locking device (Br. 11). This, we submit, is a virtual confession of liability.

It was Arrow's paid contractual duty not to fasten the hatch cover "as well as they could" but to do it properly and safely. It is usual practice to lash such covers for safety when there is no locking device or in addition to the locking device where that appears necessary. The contract provided that Arrow would supply usual gear and even if the ship had not kept gear available for lashing, it was Arrow's duty to furnish the necessary gear.² Moreover, Carnes, the boatswain responsible for the hatch, testified expressly that the ship kept turnbuckles and rigging right by

²Article 1, A, provides: "The Contractor, as an independent contractor, agrees to load and discharge cargoes and in connection therewith, to furnish equipment and services and perform all the duties of a stevedore * * *."

the covers for this purpose (Wms. R. 229). This gear was at hand to be put on at once, once the accident had happened. The admissions of Arrow's longshoremen who fastened the covers is plain that their foreman paid no attention to the proper fastening of the covers with the dogs or hooks. They "just slapped them on" (Mchl. R. 95), and one of Arrow's men, who did the fastening, admitted the covers should have been lashed and that "If I was a foreman I would do it myself" (Mchl. R. 92-93).

Although the United States paid Arrow to open and fasten the hatches safely, the crux of Arrow's contentions in this Court, which were erroneously accepted by the court below and are now renewed, is that Arrow's duty to open the hatches properly and safely was fully performed when it told the ship's officers that its longshoremen had not done the work of opening the hatch properly and safely and asked the help of ship's crew (see Br. 12-18). Thus Arrow asserts that (Br. 12) it had no duty to inspect the hatch which it had opened to see if it was safe; that (Br. 13) since the ship lashed the cover after the accident, it was the ship's duty and not that of Arrow to lash it before; that (Br. 13) the Government was required not only to make available to Arrow but to introduce in evidence itself certain written orders (confirming that in accordance with their standard form contracts, stevedores, such as Arrow, were required to open the hatches and while ship's personnel might aid them, they were not to relieve them of the performance of the duty for which they were paid); that (Br. 14-16) when Arrow's men asked the ship

to aid them in fastening the hatch cover, Arrow no longer had any duty to inspect or otherwise ascertain if it had been done (this despite the fact that the officer had said only that he would do it sometime next morning when it was convenient (Mchl. R. 55, 59)).

It is evident from the foregoing that this case involves no question of trial *de novo*. The error of the court below was not in appreciating the facts but in accepting these contentions of Arrow as to the respective duties of Arrow and the United States under the standard form contract and finding that the unseaworthy condition of the unsecured hatch cover was not only the fault of the United States which was under a non-delegable duty, but not the fault of Arrow whom the United States had employed to secure it. Consideration of the court's own essential findings shows that the locking device which the Navy personnel could work safely but which, it is claimed, the longshoreman could not, or at least did not work successfully, was not the cause of the accident. The locking device was the occasion but not the cause. The sole proximate cause of the unseaworthy condition of the open cover and of the resulting accident was the negligent failure of Arrow's foremen (a) to safely lash the cover as was Arrow's duty under the contract and (b) to keep its men out of the hatch until the cover was made safe whether by Arrow's own men, as required by the contract, or by the ship's personnel, as loaned servants of Arrow. That the locking device had to be handled in a particular way to work properly (see testimony of Carnes, the boatswain, sum-

marized in Government's brief, pp. 17-18) could not cause the accident without the supervening reckless conduct of Arrow in failing to perform its duty to lash the cover and sending its men to work in the unseaworthy hatch.

Appellee's only escape is to have this Court, like the court below, adopt its argument that "Arrow's foreman and his men did all that was customary and permissible on Navy ships in the way of checking equipment; they looked at the hatch door and it appeared to be safe" (Br. 17). We submit that only the contracting officer by amendment in writing could thus alter Arrow's written obligation under Article 6 of the contract to open and secure the hatch covers safely and properly.

II.

ARROW IS NOT RELIEVED OF LIABILITY TO THE GOVERNMENT BECAUSE NO APPEAL WAS TAKEN FROM THE DECREES IN FAVOR OF LIBELANTS.

Arrow further contends that the Government is barred from recovery-over by its decision not to appeal the decrees in favor of libelants. Arrow asserts (Br. 28) that "In a tort case, liability cannot be fastened without fault" and argues that the only basis for government liability is "the vessel's unseaworthiness, or the negligence of its employees." But this disregards the non-delegable duty of the Government, as shipowner, to furnish a seaworthy ship and a safe place of employment to Arrow's employees such as libelants. See *Porello v. United States* (2d Cir., 1946),

153 F. 2d 605, 607, affirmed on this point *sub nom. American Stevedores v. Porello* (1947), 330 U.S. 446; see *Seas Shipping Co. v. Sieracki* (1946), 328 U.S. 85. It was no ground of escape for the Government that it employed Arrow to open the hatch and secure the cover in a proper and seaworthy fashion, if need be by lashing. It was no defense to the Government that the sole proximate cause of the unseaworthy condition of the raised hatch cover was the fault of Arrow in failing properly and safely to secure it in the open position. The negligence of Arrow's employees in leaving the hatch cover in an unseaworthy condition imposed liability on the United States just as surely as if the individuals involved had been employees of the United States.

Cases involving negligent handling of winches, such as *Desiano v. United States* (S.D.N.Y.), 1946 A.M.C. 544, and *Shelton v. Seas Shipping Co.* (E.D. Pa.), 1947 A.M.C. 1526, where the negligence of the stevedore's men did not contribute to creating an unseaworthy condition of the vessel, are totally unrelated to the present case. Here the fact that the locking device for the hatch cover could be successfully operated by Navy personnel who knew how to work it but not by the longshoremen was not *per se* an unseaworthy condition endangering the longshoremen. It became such only when Arrow's employees opened the hatch, found they could not make the cover safe with its locking device alone, but failed either properly to secure the cover by lashing or other ordinary means, or to reclose the cover. This circumstance that the unseaworthy condition of the hatch cover was ex-

clusively due to the negligent manner in which Arrow opened and left it unsecured did not afford the Government a defense against libelant merely because the active negligence—the failure to exercise the last clear chance to prevent the accident—was that of Arrow to whom the Government had delegated the work.

We submit the United States is not required to take a futile appeal as a condition to enforcing its right to recover for Arrow's negligence in the performance of its contractual duty to carefully stevedore the Government's vessel, including the safe raising and fastening of the hatch covers.

III.

ARROW IS NOT RELIEVED OF LIABILITY UNDER THE IMPLIED CONTRACT TO INDEMNIFY THE GOVERNMENT FOR DEFECTIVE PERFORMANCE UNLESS IT IS WHOLLY FREE FROM FAULT.

Absent express contractual language to the contrary, there is an implied undertaking in every contract to perform services that the contractor will indemnify the person hiring him against liability due to the contractor's negligence. *Dunn v. Uvalde Asphalt Paving Co.* (1903), 175 N.Y. 214, 217-218, 67 N.E. 439.³ But

³There the court said: "The contract between the plaintiff and the defendant was informal and contained no express stipulation that the defendant should be indemnified against liability or loss which might arise from the negligent performance by the plaintiff of the work which he had engaged to do. The plaintiff's alleged liability must, therefore, be predicated upon the rule of law under which a person guilty of negligence is charged with the responsibility for his wrongful act, not only directly to the person in-

Arrow seeks to construe the Government's standard contract so as to relieve itself of liability for breach of its undertaking properly and safely to open and secure the hatch cover and shift the liability from the underwriters whom the Government required it to obtain. It argues (Br. 31) that the provisions of the contract must be construed not as declarations of the general law but as in contravention of it. The contract provides:

(b) The Contractor shall be liable to the Government for any loss or damage which may be sustained by the Government as a result of the *negligence or wrongful acts or omissions of the Contractor's officers, agents or employees* or through fault of its *equipment or gear*, subject, however, to the following limitations and conditions:

* * * * *

(2) The Contractor shall not be responsible to the United States for any loss or damage resulting from *any act or omission of any employee of the Government*, or resulting from compliance by officers, agents, or employees of the Contractor with specific directions of the Port Director, NTS, Twelfth Naval District. Nor shall the Contractor be so responsible for any such loss or damage resulting from default of *ships or other gear* supplied by the Government.

jured, but indirectly to a person who is legally liable therefor. In the latter case the wrongdoer stands in the relation of indemnitor to the person who has been held legally liable, and the right to indemnity rests upon the principle that every one is responsible for the consequences of his own wrong, and if another person has been compelled to pay the damages which the wrongdoer should have paid the latter becomes liable to the former. (*Village of Port Jervis v. First Nat. Bank*, 96 N.Y. 550; *Oceanic S. N. Co. v. Compania T. E.*, 134 N. Y. 461.)''

This, it seems plain, merely declares the general law in cases of sole fault of either party. But situations involving the fault of both are left to the determination of the regular rules of common or maritime law, whichever of those differing rules may be applicable.

It is the well-known and obvious purpose of such language to effect a formal declaration of the general rules of law respecting the impact of loss occurring in the course of the performance of the contract so as expressly to exclude any varying rules of local law. It is familiar that between private parties the rule of *Erie RR. Co. v. Tompkins* (1938), 304 U.S. 64, prescribes the application of the local law except to where the law maritime controls. Recent cases have reestablished that acts and transactions involving the United States are to be judged by federal and not local law. *Clearfield Trust Co. v. United States* (1943), 318 U.S. 363, 366, and *Allegheny County v. United States* (1944), 322 U.S. 174, 181-183 (contracts); *United States v. Standard Oil Co.* (1947), 332 U.S. 301, 305-310 (torts).⁴ But the practice of government contracting officers of expressly declaring in their contracts the rules intended to be applicable so as to preclude the application of possible unknown local variants has not been abandoned.

⁴See *United States v. Robeson* (1835), 9 Pet. 319, 325, where the court declared, "The principles involved in this case are connected with the fiscal action of the Government, and they cannot depend upon the local practice or law of any state." Cf. *Irvine v. Marshall* (1857), 20 How. 558, 563; *Duncan v. United States* (1833), 7 Pet. 435, 449; *Cox v. United States* (1832), 6 Pet. 172, 203.

And for this very reason the contract here does not go further and declare a single rule applicable in all cases where stevedore and ship are both at fault. Under the familiar standard form compensation policy issued by all underwriters and which the Government's contracts require its stevedore contractors to procure it is provided:

One (b) To Indemnify this Employer against loss *by reason of the liability imposed upon him by law* for damages on account of such injuries to such of said employees as are legally employed wherever such injuries may be sustained within the territorial limits of the United States or the Dominion of Canada * * *. (Emphasis supplied.)

The liability of the stevedore contractor in both-to-blame situations is thus insured only to the extent provided by the applicable common or maritime law and not to the extent of any broader contractual indemnity which the Government might insert in its contracts. Should the Government ask for more than the indemnity or contribution given by the general law, common and maritime, it would have to pay its contractors for the added premium—directly where cost-plus contracts are involved, indirectly in the case of competitive bidding or negotiated contracts. The government draftsmen therefore seek to obtain and preserve the broad rights of indemnity and contribution available under the applicable general law, but no more. But nothing in the contract indicates governmental intention to waive rights against Arrow in respect of which the latter has been required to insure

and thus to give the compensation underwriter a windfall at the expense of the United States.

How great is Arrow's effort to distort the contract is shown by its claim that the expression "ships or other gear supplied by the Government" when used in a stevedore contract should be construed as including such equipment as hatches and their covers and locking devices and its resort to Roget's Thesaurus for a definition of "gear" alone—not, it should be noticed, of "ships and other gear supplied by the [shipowner] Government." The meaning of the expression "ship's gear" in connection with the stevedoring of vessels is, of course, a matter of familiar usage in the shipping world. In the standard work of Joseph Leeming, *Modern Ship Stowage* (U. S. Department of Commerce, Industrial Series—No. 1), U. S. Government Printing Office, 1942, it is stated at page 33—

The term "ship's gear" is used to describe the ship's deck winches, its cargo booms attached either to masts or kingposts, and the ropes or falls used in connection with the booms and winches for hoisting or lowering drafts of cargo.

It was in this sense that the contract employed it. And the contract expression "other gear" equally refers to other cargo-handling gear furnished by the shipowner. In this very article of the contract, where a broader meaning was intended so as to include equipment of all types—as in connection with the contract undertaking of the stevedore to hold the Government harmless—the expression chosen by the draftsmen was "fault of its *equipment* or gear." The

contract itself contains a definition of gear. In Article 1, D, it is provided:

The vessel to be loaded or discharged shall be equipped with booms having all normal gear, such as guys, topping lifts, preventers and affixed cargo blocks. Normal gear is defined as a ship arriving alongside the dock with gear in condition to start work immediately on the type of cargo that is scheduled for handling first.

Arrow's attempt to distort the meaning of "ship's and other gear" must thus fall before the definition of the contract itself.

We submit, therefore, that the meaning of the contract is clear and that Arrow and its underwriters are not relieved of their liability to the United States under the implied contract of indemnity and the applicable general law.

IV.

ARROW IS NOT RELIEVED OF LIABILITY TO THE GOVERNMENT BY SECTION 5 OF THE LONGSHOREMEN'S COMPENSATION ACT.

In Arrow's view of the case (Br. 36), recovery-over under the implied contract of indemnity is barred by the language of Section 5 of the Compensation Act (33 U.S.C. 905) which declares liability under the Act to be "exclusive and in place of all other liability to * * * anyone otherwise entitled to recover damages from such employer." Passing over Arrow's rejection of the rule of *ejusdem generis*, which would require "anyone" to be restricted to anyone claiming on be-

half of the employee and those claiming through him, and Arrow's disregard of the purpose of the Act, which was to benefit injured employees, not to exonerate employers from liability to third parties for breach of contract, we find that Arrow's view was rejected by the Supreme Court in *American Stevedores v. Porello* (1947), 330 U.S. 446, 458.

In the *Porello* case the Second Circuit had first held that "Since the libelant has no cause of action against his employer, the United States can claim no contribution on the theory of a common liability which it has been compelled to pay" (153 F. 2d at 607). Subsequently, on petition for rehearing, it held that "the point may be considered left open since determination of the right of contribution is not essential to decision as to indemnity under respondent's contract" (153 F. 2d at 609). The Supreme Court, however, clearly rejected the suggestion that there would be no liability except for an express clause in the contract. After reviewing the indemnity clause of the contract and finding it ambiguous as to the extent of the indemnity provided, the Supreme Court declared, "If the district court interprets the contract not to apply to the facts of this case, the court would, of course, be free to adjudge the responsibility of the parties to the contract under applicable rules of admiralty law" (330 U.S. at 458).

There can therefore be no possible doubt that in the view of the Supreme Court the compensation act does not bar recovery by the United States against Arrow. *Coal Operators Casualty Co. v. United States* (E.D. Pa., 1947), 76 F. Supp. 681, 682-683; *The S.S. Samo-*

var (N.D. Calif., 1947), 72 F. Supp. 574, 588; *Portel v. United States* (S.D. N.Y.), 1949 A.M.C. 487, 491. The unreported case of *Johnson v. United States* printed in appellee's appendix stands alone to the contrary and is, we submit, in error. It purports to rely upon *Frusteri v. United States*, 76 F. Supp. 667, 669. But that case held only that where the libel against the United States was dismissed there could be no claim that the impleading petition had introduced a new party liable to the employee-libelant. Thus the United States could have no claim for indemnity or contribution since it had suffered no loss. Examination of the cases cited at 76 F. Supp. 669 shows that Judge Inch was referring only to the exclusiveness of the compensation remedy so far as libelant was concerned. He was not holding that the compensation act abrogated the implied contract of indemnity incidental to every contract for the performance of services.

V.

IF NOT LIABLE-OVER ON ITS IMPLIED CONTRACT OF INDEMNITY, ARROW IS LIABLE ON ITS EXPRESS UNDERTAKING THAT ITS COMPENSATION UNDERWRITER AND ITSELF WOULD WAIVE SUBROGATION AGAINST THE UNITED STATES.

Arrow's unconscionable attempt to escape its agreement to waive any right to recover reimbursement from the United States for the amounts of the compensation payments made by itself and its underwriters scarcely deserves comment. Taking advantage of an obvious error in the numbering of the "Liability

and Indemnity" article of the contract, Arrow argues that its attempt to obtain reimbursement of the amounts of compensation by asserting an equitable lien and right of subrogation to the claim of libelants against the United States is not the type of reimbursement and subrogation which it agreed should be waived (Br. 34). It further argues that, in any event, the provisions for waiver apply only to cases involving explosive risks and not to cases, like the present, which involve ordinary commercial risks (Br. 4, 34-35).

Arrow does not deny its attempt to obtain reimbursement indirectly from the United States and thus avoid the effect of its waiver. From the beginning Arrow and its underwriter have insisted that any recovery by libelants from the United States belongs to Arrow to the extent of the compensation payments and that Arrow has a lien thereon. The answers of Arrow in both cases expressly allege that Arrow caused compensation to be paid in the amount of \$1,855.49 to Williams (Wms. R. 35) and in the amount of \$1,282.41 to the heirs of Mitchell (Mchl. R. 21). In the *Williams* case Arrow induced the court to impose a lien in its favor in the amount of \$1,855.49 upon libelant's recovery (Wms. R. 60). In the *Mitchell* case, although it plainly appears from the pleadings that the suit was for the benefit of the same identical heirs (Mchl. R. 4), the attempt to obtain an express declaration of the lien was not repeated.

A. Reading the simple language of the contract's waiver provision shows at a glance that indirect reimbursement to Arrow and its underwriters of the amount of the compensation payments which they

made to libelants is precisely the type of reimbursement which the United States was seeking to have waived. With emphasis supplied to the significant phrases, Arrow's undertaking was:

Notwithstanding any other provision of this contract, the Contractor agrees to waive any right of reimbursement for loss or damage of any kind or character which it may have against the Government under any provision of this agreement if said loss or damage is covered by insurance and Contractor has collected or may collect for said loss or damage from the insurance company. The Contractor further agrees to have attached to and made a part of all insurance policies issued pursuant to this agreement on operations thereunder a rider by the terms of which the insurance company agrees to waive any and all rights of subrogation which it may have against the United States by reason of any payment under said policy.

We submit that this language is plain and that despite any other provision of the contract, Arrow and its underwriters agreed that they would not seek reimbursement from the United States of the amounts which the underwriters might pay to injured employees as workmen's compensation. That is what they attempted to do here.

Counsel assert, however, that "Arrow is not seeking 'reimbursement' by reason of any right 'against' the United States; its lien claims are on the judgments which were entered in favor of libelants" (Br. 34). But Arrow's contention is thus disingenuous in the extreme. The alleged equitable lien on libelants' judg-

ment which Arrow asserts is founded upon a claim of subrogation, to the extent of the compensation paid, to the rights of libelants to recover judgment against the United States. The purpose and effect of Arrow's claim of subrogation and equitable lien is, of course, to permit Arrow and its underwriter to obtain indirectly reimbursement from the United States of the compensation payments which the compensation insurance covered. Since the 1938 amendments to Section 33(b) of the Longshoremen's Act (33 U.S.C. 933(b)), there can no longer be any direct reimbursement. And it is just such indirect reimbursement from the United States which the contract was intended to require Arrow and its underwriter to give up.

An understanding of the meaning and application of the contract provision governing the waiver by Arrow and its compensation underwriters requires a review of the development of these matters since the 1938 amendment. Since the Government has, in effect, paid the cost of the compensation insurance premiums, it requires the contractor to have its compensation insurance carrier continue to bear the burden it was paid to assume and not shift it to the United States even where the latter was solely at fault. It is therefore essential to have all right to reimbursement waived, although since the amendment it is no longer direct but is indirect, through subrogation *pro tanto* to any claim of libelants against the United States together with the equitable lien created by the courts to implement such subrogation.

Prior to the 1938 amendment to Section 33(b) of the Longshoremen's Act (33 U.S.C. 933(b)), steve-

dore contractors such as Arrow and their compensation insurers could not make any attempt, like the present by Arrow, to escape the operation of their agreement to waive all rights of reimbursement and subrogation. Receipt of any compensation by an injured employee operated under the former law as an automatic statutory assignment whereby any cause of action of the employee against the United States passed directly to the employing contractor subject to the compensation insurer's right of subrogation. *Doleman v. Levine* (1935), 295 U.S. 221, 225.

Thus, prior to 1938, the waiver by the contractor and his underwriter of their rights of reimbursement and subrogation to the claim of the injured employee against the United States, made substantially in the language still found in the standard form government contract, prevented all possibility of either claiming to be subrogated to the rights of the injured employee. If the contractor or its compensation insurance carrier brought suit against the United States on the claim of the injured employee, the United States was able without more to assert as its special defense that recovery, to the extent that it reimbursed the contractor and insurance carrier for compensation, had been waived.

Since the 1938 amendment to Section 33(b), however, the previous automatic statutory assignment is confined to only those cases where payments of compensation had been made under an award by a deputy commissioner and excluded assignment from cases, like the present, where compensation was paid voluntarily. This has given rise to the present large num-

ber of cases where suit, instead of being brought in the name of the contractor to the use of the injured employee and to reimburse itself and its compensation insurer, is brought in the name of the injured employee for himself and also to the use of his employer, such as Arrow, to reimburse the latter and its compensation insurer for the compensation payments.

Where no question of waiver of reimbursement or subrogation against the party against whom the suit is brought is involved, the courts, since the 1938 amendment, protect the right of the employer and compensation insurer to be subrogated *pro tanto* to the recovery effected by the injured employee by recognizing an equitable lien in their favor upon the employee's recovery. *The Etna* (3d Cir., 1942), 138 F. (2d) 37, affirming (E.D. Pa., 1942) 46 F. Supp. 156.

Unquestionably the same rule would apply to suits against the United States were it not for the agreement by the contractor and compensation insurer to waive their rights to be reimbursed. But where, as in the present case, there has been a waiver of the rights to reimbursement and subrogation, the United States is still entitled to the waiver for which it stipulated and to the return by Arrow of the amount of the compensation payments which it has recovered by subrogation and equitable lien on the employee's judgment against the Government. The amendment of the statute should not defeat the intent of the contract.

We do not question Arrow's right *vis-a-vis* the libelants. It seems clear that the waiver of the right of the contractor to be reimbursed for the amount of

compensation payments and of the compensation insurer to be subrogated was for the benefit of the United States, not to give either the injured employee or the compensation insurer a windfall at the expense of the Government. The compensation insurer and the employee have no right to recover from the Government, as they already have in these cases, and then invoke the benefit of the waivers agreed upon between the Government, the contractor and the underwriter for the purpose of escaping their obligation to pay over to Arrow the amount of the compensation payments.

We submit that Arrow is entitled to reclaim from the libelants the amount of the compensation payments. But unless Arrow be held liable-over to the United States for idemnity or contribution, Arrow is liable to return to the United States the amounts of compensation which, in breach of its agreement not to seek reimbursement from the United States of amounts paid by the compensation insurance required by the Government, it has in fact been reimbursed by the United States on its claim as subrogee of libelants.

B. Arrow's contention that the waiver clause applies only to cases of explosive risks, not to ordinary commercial risks such as are here involved (Br. 34), is equally a distortion of the obvious meaning of Section (c) taken as a whole. The types of stevedoring work covered by the standard form Navy contract under which Arrow performed the services here involved were two: (1) stevedoring services of a nature

normally performed in peacetime commercial operations, and (2) services in connection with inherently dangerous cargo only handled in wartime such as ammunition, explosives and similar articles. With indication of the two distinct types, the pertinent language reads:

(c) The services to be performed in pursuance of the provisions of this contract are incident to war activities of the Government and *will include* [1] *services of a nature normally performed by the Contractor in peace time commercial operations* with the risks and hazards normally incident thereto and *may involve* [2] the loading, discharging, handling, presence of proximity of ammunition, explosives, gasoline, and other *inherently dangerous cargoes*. It is understood that the consideration herein provided to be made to the Contractor for the services to be performed hereunder have been established with regard only to the *normal risks and hazards* involved in similar services *in peace time commercial operations*, but that such consideration does not include any allowance for the additional and extraordinary risks and hazards described above. To induce the Contractor to undertake the performance of *such services* [involving dangerous cargoes] for the consideration herein provided, and thus obtain for the Government the resulting benefit of such reduced consideration, the Government will hold the Contractor harmless against any loss, expense (including expense of litigation), and liability to third persons because of death, bodily injury, or property damage or destruction or otherwise of any kind whatsoever, irrespective of negligence of Contractor,

his officers, agents, servants or employees; subject, however, to the following conditions and limitations:

Provision as to indemnity in both types of operations are described in subparagraphs (1) to (3), by which the Government indemnifies only against loss exceeding \$250,000 in explosive risk cases (see Appellee's Appendix, pp. ii-iv).

In respect of commercial type operations, stevedore contractors are required to assume the usual risks and indemnify the Government in accordance with preceding Section (b) and the general law (see *supra*, p. 14). In respect of explosive type operations, stevedore contractors are fully indemnified by the United States only (1) where the loss was attributable to explosives, (2) where the damage exceeds \$250,000 and then only as to the excess, (3) where the contractor has not disobeyed government instructions and its officers and pier supervisors have not been negligent.

There is thus no evidence of any contractual intent to confine the waiver of paragraph (4) to cases where the Government is under a duty to indemnify. A glance at the "Liability and Indemnity" article of the contract (Appellee's Appendix, pp. i-iv) shows that the article's last paragraph, numbered (4) in that appendix, is not, as Arrow argues, one of the "conditions and limitations," like (1), (2) and (3), restricting the cases where the United States is to indemnify the contractor against loss resulting from non-commercial explosive operations. On the contrary, the

introductory expression of paragraph (4)—“Notwithstanding any other provision of this contract”—clearly shows the waiver provision to be entirely independent. It is obvious that what happened was a mistake in numbering, that in fact it should have been designated “(d)”, not “(4).”⁵ We submit that this Court should give effect to the clear meaning of the language itself and disregard the obvious error in numbering.

We submit that, just as prior to 1948, their waivers of reimbursement and subrogation prevented the contractor and compensation insurer from obtaining reimbursement from the Government of the amount of their compensation payments by suit in their own names, so now the same waivers prevent Arrow and its underwriters from obtaining reimbursement from the Government, although the suit against the Government is brought *pro tanto* to their use by the injured employee in his own name. Arrow and its underwriter hold the amounts thus obtained to the use of the United States and if not liable-over to the United States for indemnity and contribution, are liable to repay to the United States the amount of the compensation they have been reimbursed.

⁵In the unpublished standard form prescribed by the Navy Department, the Liability and Indemnity article is not divided into lettered but into numbered sections and what are designated (a), (b) and (c) of the Arrow contract are designated (1), (2) and (3) of the prescribed form. As (3) of the prescribed form, designated (c) in Arrow's contract, is divided into paragraphs (1), (2) and (3), it is apparent that the typist who cut the mimeograph stencil for Arrow's contract made a mistake in carrying out an order to letter instead of number the sections. The paragraph numbered (4) should in fact have become (d).

CONCLUSION.

For the reasons stated, it is respectfully submitted that the decisions below should be reversed with appropriate instructions to enter decrees against Arrow.

Dated, San Francisco, California,

June 15, 1949.

Respectfully submitted,

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Nos. 11,519 and 11,880

IN THE
United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.

ARROW STEVEDORING COMPANY (a corporation),
Appellee.

UNITED STATES OF AMERICA,
Appellant,
vs.

ARROW STEVEDORING COMPANY (a corporation),
Appellee.

On Appeals from the District Court of the United States for the
Northern District of California, Southern Division.

APPELLEE'S PETITION FOR A REHEARING.

FILED

JUL 20 1949

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APPELLEE'S PETITION FOR A REHEARING.

*To the Honorable William Denman, Chief Judge,
and to the Honorable Associate Judges of the
United States Court of Appeals for the Ninth
Circuit:*

Appellee respectfully petitions the Court for a rehearing upon the following grounds:

The Court in its decisions with respect to each of the above entitled cases committed error, as a matter of law, in the following respects:

(1) The Findings of Fact and Conclusions of Law of the District Court holding the Government liable on the basis of its sole fault were not appealed from and are therefore final and binding on the Government, and this Court is consequently without jurisdiction or power to disturb or set them aside.

(2) The decisions are based on the faulty legal conclusion that liability for damages fastens on the ship in the complete absence of its fault or negligence and merely because of the existence of unseaworthiness, which has no causal connection and is unrelated to the accident.

(3) The Court has further erred in holding that "unseaworthiness" of the vessel was created by the stevedores because of their "conscious *use* of the ship's hatch cover with knowledge of its defect" and in such a dangerous manner as to cause the accident and that therefore the Government, as vessel owner, is liable to the injured longshoremen by reason of such purported unseaworthiness.

(4) There is further error in the Court's finding that under the stevedoring contract Arrow had any liability to the Government for injuries resulting solely and proximately from Arrow's negligence.

There is no question that the Court found that the sole proximate cause of the accident was the negligence of Arrow. See this Court's opinion in the *Williams* case (No. 11,519) at page 5, as follows:

“On the facts *we find that the sole proximate cause of the injury to Williams was the negligence of Arrow* in its use of the door with knowledge of its defects of dogs and pins. The Government in no way participated in the wrongful use of the door, which otherwise could have been made secure in the usual manner described by Arrow’s Larsen. *Seaboard Stevedoring Co. v. Sagadahoc S.S. Co.*, 32 F. (2d) 886 (Cir. 9); *Bethlehem Shipbuilding Corp. v. Joseph Guttradt Co.*, 10 F. (2d) 769, 771 (Cir. 9); *The Mars*, 9 F. (2d) 183, 184 Learned Hand, D. J.” (Emphasis added.)

And similarly in the *Mitchell* case (No. 11,880) at Page 4:

“We hold that the *sole proximate cause* of Mitchell’s death was the negligence if not recklessness of Arrow’s working of the men in the known dangerous condition there existing.” (Emphasis added.)

I.

THE GOVERNMENT’S RIGHT TO RECOUPMENT MUST BE BASED SOLELY UPON THE FINDINGS AND DECREE IN FAVOR OF THE LONGSHOREMEN WHICH BECAME FINAL IN THE DISTRICT COURT, NO APPEAL HAVING BEEN TAKEN.

As this Court has seen fit to make new and different Findings of Fact contrary to its often repeated rule against doing so (see the authorities listed by Judge Fee on Pages 6 and 7 of the Dissenting Opinion in the case of *Menafee v. Chamberlin*, No. 12124, decided June 23, 1949), a new point is raised which was not previously presented.

The Government cannot be solely at fault for the accident as to one party litigant, and wholly without fault for the same accident as to the other party litigant, in the same cause of libel.

The Government was under no particular requirement or duty to implead the Arrow Stevedoring Company in the original cause of libel but could, in the event of its being held liable, have elected to proceed independently against Arrow in a later recoupment or holdover action. Had this course been followed, the basis for the Government's recoupment would of necessity be the Findings of Fact and Conclusions of Law in the cause of libel against the United States by the libelants. Such a recoupment attempt would, unquestionably, have failed because the Government would have been bound by the Findings of Fact and Conclusions of Law which held and found the Government to be solely at fault in the original cause of libel. Admiralty Rule 56 does not enlarge on any of the Government's rights of recoupment as aforesaid. The rule merely provides a simple method for the avoiding of a multiplicity of suits. It permits a single forum for one adjudication as to all of the parties involved and in no way changes or enlarges the substantive law. As the record now stands, the Government is not entitled to seek or claim recoupment on any basis other than that pursuant to which its liability to the injured was originally established and that basis, because of the Government's failure to take an appeal, is now final and *res adjudicata*, and this Court is without jurisdiction to examine or amend the Find-

ings of Fact and Conclusions of Law which established the Government's primary responsibility. The basis of recoupment to which the Government is limited is therefore one involving its sole fault. As the record now stands, the liability for which the Government is seeking to recoup from Arrow is the wrong which the Government committed as the result of its sole fault. This Court, by the contrary conclusions thus presented, has left the parties to this single action in the following position:

(a) *As to the longshoremen:* The Government is solely to blame for the accident and Arrow is entirely free from fault.

(b) *As to Arrow:* The Government, on the same facts and the identical record, is nowise to blame for the same accident and the sole fault is Arrow's.

Thus we have two opposed and completely antagonistic results in the same cause of libel involving the same parties and the same facts. In short, as to the prevailing libelants the Government has been held solely at fault as a matter of final record, which conclusion, as stated, cannot be disturbed by this Court since it is without jurisdiction to review it. As to Arrow, the Government has now been held blameless and Arrow fully at fault. This preposterous situation is brought about not through any act of Arrow but by the deliberate act of the Government in not perfecting an appeal or complaining of the trial Court's Findings of Fact and Conclusions of Law holding it fully at fault. By this failure to complain or object to the charging allegations of the libelants and Findings of

Fact and Conclusions of Law thereon, the Government has permitted them to become final and consequently has consented and agreed thereto. The Government's agreement is now irrevocable, and it is estopped to attack the lower Court's findings and decree, and it can only seek recoupment from Arrow on the basis for which it was originally held liable, viz., its sole fault.

II.

A VESSEL OWNER CANNOT BE SADDLED WITH LIABILITY FOR INJURY TO AN EMPLOYEE OF AN INDEPENDENT CONTRACTOR WHOSE NEGLIGENCE IS THE SOLE PROXIMATE CAUSE OF THE INJURY.

This Court has committed grave error in holding that the Government, as the vessel owner, was in any respect liable to the injured men for the consequences of the accident, in view of its findings that the "sole proximate cause" of the occurrence was the "negligence" of Arrow.

We respectfully submit that Government counsel have woefully mislead the Court by their faulty interpretation of the United States Supreme Court's decision in the case of *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 90 L. Ed. 1099 and have misapplied the legal significance of this Court's opinion in the case of *Seaboard Stevedoring Corp. v. Sagadahoc SS Co.*, 32 Fed. (2d), 886 (Cir. 9).

It is true that in the *Sieracki* case the United States Supreme Court did observe that unseaworthiness "is

essentially a species of liability without fault" and that "it is a form of absolute duty owing to all within the range of its humanitarian policy." Sieracki's injuries occurred while he was employed as a winch driver for an independent stevedoring company aboard a vessel owned and operated by Seas Shipping Co., when a shackle supporting a boom broke causing the boom and tackle to fall and strike him. He sued Seas Shipping Co. and two other companies which had built the vessel. The Court held that the remedy for injuries *proximately caused* by unseaworthiness, which has always been available to members of a crew of a vessel, was also available to a longshoreman employed by a third party such as in Sieracki's case.

But here is the vital difference between the facts involved in the *Sieracki* case and those in the cases at bar: Sieracki's injuries were *solely and proximately* caused by the vessel's *unseaworthiness*, which unseaworthiness was created by a concern other than the employer of the injured longshoreman. The accident in the present proceedings was found by the Court to have been *solely and proximately caused by the negligence of Arrow*, the employer of the men injured, and any so-called "unseaworthiness", as suggested in this Court's opinion, was immediately and directly created by the longshoremen themselves. We submit that in the latter circumstances the Government cannot be held liable to the injured longshoremen and that the *Sieracki* case does not support such holding. That case decides that the vessel owner is liable for injuries proximately caused by any unseaworthiness of the vessel,

even though the owner may not have been negligent in creating such unseaworthiness. Liability is fastened upon the shipowner for its breach of warranty. Sieracki was allowed to recover from the vessel owner because a faulty condition of the ship proximately caused his injuries. In the matters at bar the Court holds that "*the sole proximate cause of the accident was the negligence of Arrow,*" *the employer of the injured men.* The Government, as vessel owner, could therefore not be liable upon any conceivable legal basis because the accident, according to the Court's findings, was not caused by any negligence on the part of the Government or any defective or unseaworthy condition of its vessel, other than that actively created by the longshoremen themselves.

In addition to the foregoing, the *Sieracki* case is not in point for another important reason in that the Supreme Court qualified its opinion to exclude therefrom this exact type of case. At page 95 the Court states:

"The latter (stevedore employer) ordinarily has neither right nor opportunity to discover or remove the cause of the peril and it is doubtful, therefore, that he owes to his employees, with respect to these hazards, the employer's ordinary duty to furnish a safe place to work, unless perhaps in cases where the perils are obvious *or his own action creates them.*" (Emphasis supplied).

This Court has found, as we have pointed out elsewhere, that the perils and negligence involved were the sole proximate cause of Arrow's negligence, thusly

bringing them clearly within the foregoing exception of "cause" created by its (Arrow's) "own action".

In admiralty it is fundamental that a vessel owner is not liable for injuries to an employee of a third party in the absence of a showing that unseaworthiness of the vessel resulting from a faulty condition *proximately caused* such injuries. See *Desiano v. United States of America*, 1946, A.M.C. 544 and *Shelton et al. v. Seas Shipping Company*, 1947 A.M.C. 1528 where the injured longshoremen failed in suits against the respective vessel owners because of lack of proof that their injuries were proximately caused by alleged unseaworthiness. As stated in Robinson on Admiralty, on page 305:

"That the ship merely is unseaworthy does not avail the seaman, however. The injury must be due to unseaworthiness in respect to the thing from which injury results."

See also *La Guerra v. Brasileiro*, 1941, A.M.C. 1376, 39 Fed. Supp. 668.

We know of no existing precedent for the remarkable fiction which was urged by the Government and adopted by this Court that "negligent use" of a vessel's appliance by longshoremen employed by an independent contractor results in "unseaworthiness" of the ship for which the owner can be held liable in the event of injuries sustained by fellow employees of the stevedoring company whose negligence was the sole proximate cause of the accident. Taking all of the authorities from *The Osceola*, 189 U.S. 159, 23 S. Ct.

483, 47 L. Ed. 760, down to the aforementioned case of *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 90 L. Ed. 1099, we do not find a single decision which supports this ill-advised and erroneous contention.

If this Court's holding in the present cases were to remain in effect, it is inconceivable that there would ever be a situation where longshoremen are injured through their own negligent use of the vessel's equipment that they would not be able to sue the vessel on the basis of unseaworthiness as defined by this Court.

Assume that a stevedoring firm is employed by the vessel to discharge cargo. The shipowner turns over its vessel and her appliances to the stevedore. One of the longshoremen in operating the vessel's winch allows excessive slack to accumulate which catches underneath a sling load as it is being hoisted out of the hatch causing the load to be precipitated into the hold with the result that several of his fellow employees are injured. There can be no question that the negligent operation of the winch by the longshoreman winch driver created an "unsafe place to work" for his fellow employees, and it is likewise clear that this manner of doing the work would be a dangerous and reckless practice and that the sole proximate cause of the accident would be the winch driver's "negligent use" of the ship's appliances. Can it be rationally contended that the vessel was thereby made "unseaworthy" and that the injured longshoremen could therefore recover against the vessel?

Taking another example, assume that the longshoremen in discharging cargo from the hatch fail to remove a sufficient number of hatch boards or sections of the hatch to permit the work to be done with a reasonable degree of safety and that as the sole result of their own carelessness and recklessness the load strikes and dislodges some of the hatch boards which are precipitated into the hold striking and injuring some of their fellow longshoremen. Under these facts a trial Court would be compelled to find in favor of the injured longshoremen *against the vessel* even though the vessel owner had no knowledge of nor any participation in the longshoremen's actions.

Many such examples could be enumerated and in every instance the same absurd result would obtain. In every such case the vessel owner would be required to respond for damages solely and proximately caused by the negligence of the longshoremen.

At the risk of being thought repetitious and only because the point is one of such great importance to the shipping industry as a whole, we are under compulsion to point out that in practical use and application, if ship's gear is properly handled and used by the longshoremen's accidents and injuries do not result. When the gear is mishandled or misused by the longshoremen, injuries to fellow employees result and it therefore follows under the pronouncement of this Court that for every injury suffered as a result of the *use* by longshoremen of vessel's equipment or gear, no matter how good and seaworthy it may be when

turned over to them, recovery can be had against the vessel. There will be no exceptions to this startling rule.

The case of *Gonzales v. SS Belos*, 1939 A.M.C. 324, involves facts similar to those in the cases at bar. The libellant was an employee of Jarka Corporation, an independent stevedoring company, and was injured while discharging cargo from the hold of the steamship "Belos". He sued the ship and the Court held as follows:

"I have considered the merits and believe that counsel for claimant-respondent is correct in his contention that the ship would not be liable, for the reason that if libellant was injured by negligence, it was the negligence of the foreman and coworkers of libellant that brought about the accident and was the proximate cause thereof. *Aden Maru*, 51 F. (2d) 599; *Daisy*, 282 Fed. 261-262.

"Libellant was injured by certain bales of wood pulp, which he and a number of other co-workers were engaged in discharging from the hold of the ship, falling upon him. The foreman of the stevedores knew of this condition which developed as the bales were being moved, and there is also evidence that he gave instructions which were intended to remedy the condition. Apparently these instructions were not carried out."

It is quite evident from the foregoing facts in the *Belos* case, that an unsafe place to work was created by the longshoremen themselves. (Under this Court's decision an "unseaworthy" condition was thus created.) But this was not held to be "unseaworthiness"

of the vessel for which the vessel owner could be held liable.

In the *Aden Maru* case, above cited, an injured longshoreman, employed by an independent stevedoring company, sought to hold the vessel liable for injuries sustained on the theory that the vessel's winch was defective and that "the ship failed and refused to furnish bolts for the beam" of the hatch in question. The Court held:

"In a case of this kind, where the employer (stevedoring company) was unquestionably negligent in the way the work was performed, and where, nearly a year after the injury occurred, for the first time, claim is made that the ship caused the injury, libelants should be prepared, not merely to suggest that the ship may have been negligent, and that its negligence may have been the proximate cause of the injury, but to clearly and satisfactorily establish that it was negligent, and that that negligence was a proximate cause.

"* * * assuming without deciding that the ship failed and refused to furnish bolts for the beam it is entirely plain that everyone, including Culver, knew that the beam was not bolted; and assuming in the same way that in the particulars of leaking steam and the absence of a brake the winch was defective, and that the failure to have the winch in better condition was negligence, it is entirely clear *that neither the absence of bolts, nor the condition of the winch, was the proximate cause of the injury. This occurred solely and entirely as the proximate result of the generally reckless manner in which a dangerous piece of work was being performed by attempting to drag*

the bale up across the beam knowing that it was bound to foul it unless some one pushed it off, instead of topping the boom for a complete clearance." (Emphasis added.)

After carefully considering the above facts the Court then held as follows:

"Reduced to its simplest terms, this is a case in which a serious injury has resulted on ship-board to an employee of an independently contracting stevedore in the course of a culpably negligent and dangerous method of performing work voluntarily adopted by the employer and voluntarily participated in by the employee.

"In such a case, in order to hold the ship, it must be clearly established, both that it was negligent, and that its negligence was a proximate cause of the injury. In such a case, where the evidence leaves the matter of proximate cause in doubt, it defeats the cause of action. *Reading Co. v. Boyer* (C.C.A.) 6 F. (2d) 185; *Luckenbach v. Buzynski* (C. C. A.) 19 F. (2d) 871. Where, as here, proximate cause is clearly shown to be the negligence, not of the ship, but of the employer, it is plainer still that the case against the ship must fail. *Johns-Manville v. Pocker* (C.C.A.) 26 F. (2d) 204."

Here again is a clear example of injury having been sustained by a longshoreman as the direct and proximate result of the negligence of his employer. The Court did not stretch the term "unseaworthiness" to fit a situation where the stevedore company's act of negligence created the unsafe place to work which

proximately caused injury to one of its employees. As illustrated by the facts in the case under discussion, the longshoremen themselves created “an unsafe place to work”, and in that sense, the vessel would be “unseaworthy” if this Court’s startling pronouncement is not corrected. Neither the *Sieracki* case nor any other authority justifies any such holding. In this connection we again direct the Court’s attention to the well considered opinion in the case of *La Guerra v. Brasileiro, supra*.

We believe we have adequately distinguished the facts in the *Sieracki* case, where injuries to a longshoreman were *proximately caused* by an unseaworthy condition created by an agency other than the longshoreman’s employer, and the situation here where the sole proximate cause of the injuries was the negligence of the employer of the injured men.

We shall now differentiate this Court’s holding in *Seaboard Stevedoring Corp. v. Sagadahoc SS Co.*, 32 Fed (2d) 886 (Cir. 9). The facts in that case are entirely different from the facts involved here, and that decision is not at all applicable. There the unseaworthy condition which proximately caused the accident was created not by the employer of the injured longshoreman but by the Seaboard Stevedoring Corp. which had loaded the vessel in another port. Its employees had not properly replaced the vessel’s hatch covers. The injured man was employed by another stevedoring company in a later port of call, and in the course of his employment suffered injuries because of the improperly placed hatch boards. He sued the ves-

sel and, upon proof that the injuries were proximately caused by the unseaworthy condition resulting from the improperly placed hatch boards, he recovered. The vessel owner then sued Seaboard Stevedoring Corp. and obtained recoupment of the amount of the judgment, upon proving that the vessel's unseaworthiness was caused by Seaboard. Recovery against the SS "Sagadahoc" by the injured employee of the second stevedoring company was, of course, properly allowed because the unseaworthy condition of the vessel was shown to be the *proximate cause* of his injuries. Such is not the case here where the Government contends, and the Court finds, that the *sole proximate cause* of this accident was the negligence of Arrow, the employer of the men injured.

A case strongly relied upon by the Government is *Portel v. United States of America and Zalud Marine Corporation*, 1949 A.M.C. 487. An injured ship repair worker was allowed a recovery against respondent United States, as the vessel owner, because he was able to prove that one of the proximate causes of his injury was the failure of the ship's crew to open drains in the steam lines or to inform employees of the ship repair company as to whether or not the steam lines had been drained although they knew that the ship repair men were to perform work on the valves of the steam lines. The other proximate cause was held to be the negligence of the foremen of the ship repair company in ordering the libelant to work without making any inquiries as to whether steam pressure was in the lines. Consequently, the Court

held that libelant was entitled to recover from respondent United States, and that while libelant could not recover directly against his employer, the impleaded respondent (the ship repair company), the respondent United States was entitled to partial recoupment from the impleaded respondent because of the negligence of its foremen as aforesaid.

As we have already pointed out, the *Sieracki* case involved an injury *proximately caused* by a faulty shackle and there was no negligence on the part of the employer of Sieracki.

In order to permit recovery against the impleaded respondent, it must first be established that there is a direct liability on the part of the shipowner to the injured stevedore. If, as we have here shown, no legal liability exists as between the libelant and the Government, the question of any right it may have under admiralty principles to contribution from Arrow, is moot. This brings us to a consideration of the only possible liability that Arrow could have under the facts of these cases as found by this Court: the question of its contractual liability to the Government.

III.

SHOULD THE COURT HOLD THAT ARROW'S NEGLIGENCE AND THE VESSEL'S UNSEAWORTHINESS WERE BOTH PROXIMATE CAUSES OF THE ACCIDENT, ARROW IS RELIEVED OF LIABILITY BY REASON OF SPECIFIC LIMITATIONS IN THE STEVEDORING CONTRACT.

The position taken by the Government's counsel has placed them in a dilemma from which they cannot escape. The Court must choose between one of two position is—it cannot maintain both:

(1) The accident was solely and proximately caused by the negligence of Arrow, in which case the Government cannot sustain any "loss or damage", under the contract or otherwise, or

(2) The defective and unseaworthy hatch cover was a proximate cause of the accident, in which event the limiting provision of the contract providing that Arrow shall not be liable where "such loss or damage" is occasioned by a defective condition of the vessel or its gear, applies.

In either case Arrow is not liable. The first proposition we have fully covered heretofore. As to the second alternative the contract clearly expresses the intention of the parties. Section (b) of the contract provides that Arrow shall be liable to the Government for any "loss or damage" sustained by the Government as a result of Arrow's negligence. This section, however, expresses a manifest intention to be limited in its application, since it concludes as follows:

"* * * subject, however, to the following limitations and conditions:"

The pertinent limiting language is contained as follows in Subsection 2:

“* * * Nor shall the contractor (Arrow) be so responsible for any *such* loss or damage resulting from default of ships or other gear supplied by the Government.”

We have emphasized the word “such” because we believe it demonstrates the obviousness and clear application of the limitation. The only possible significance to be attached to the words “such loss or damage” is that reference is thereby patently made directly to the words “any loss or damage” which are contained in Section (b). It is therefore crystal clear that under the contract Arrow is not liable to the Government for “any loss or damage which may be sustained by the Government as a result of the negligence” of Arrow, in the event that “any such loss or damage” results from a default of the ship or its gear.

We reiterate that the Court cannot properly hold that mere negligent *use* by Arrow’s employees of the appliances of the Government’s vessel can be said to produce “unseaworthiness”, in the sense that the Government would be liable to the employees of Arrow injured as the sole proximate result of such negligent use. The unseaworthiness, if any, existing here was the unseaworthy condition resulting from the defective hatch door. This Court, however, by a process of incredible reasoning has exonerated this defect as a proximate cause of the accident. In other words, we

insist that a nice distinction cannot be made between unseaworthiness by reason of a defective hatch cover and unseaworthiness resulting from an unsafe place to work by reason of Arrow's negligent use of said hatch door. If there was any unseaworthiness, it had to stem from the defective hatch door, and in that case the limiting provision of the contract, providing that Arrow shall not be "so responsible for any such loss or damage resulting from default of ships or other gear supplied by the Government", is clearly applicable. Accordingly, Arrow cannot be held liable to the Government under the contract, or otherwise.

CONCLUSION.

For reasons heretofore set forth, it is respectfully submitted that the decisions in each of the above matters are clearly erroneous and contrary to law and that therefore the decisions should be reversed.

In view of the Court's radical departure from all preexisting concepts of admiralty law with regard to claimed liability of a vessel owner for injuries solely and proximately caused by the negligence of the employer of the men injured, and because of the extreme importance of the Court's ruling to all firms engaged in stevedoring activities, ship repair work and related maritime operations, if this petition does not satisfy this Court that it has committed grave error, it is respectfully requested that the matter be

set down for further oral argument in order that the Court may have the advantage of a full and complete discussion of our contentions.

Dated, San Francisco, California,

July 20, 1949.

Respectfully submitted,

JOHN H. BLACK,

EDWARD R. KAY,

*Proctors for Appellee and
Petitioner, Arrow Steve-
doring Company.*

CERTIFICATE OF COUNSEL.

We hereby certify that the foregoing Petition for a Rehearing, in our judgment, is well founded and is not interposed for delay.

Dated, San Francisco, California,
July 20, 1949.

JOHN H. BLACK,

EDWARD R. KAY,

*Proctors for Appellee and
Petitioner, Arrow Steve-
doring Company.*

No. 11,662

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

see v. 2482 - 2483
PHILLIP HIMMELFARB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

WILLIAM KATZ,

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FILED

MAR 30 1949

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No. 11,662

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PHILLIP HIMMELFARB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

*To the Honorable Ninth Circuit Court of Appeals of the
United States:*

Comes now appellant, PHILLIP HIMMELFARB, and respectfully petitions this Honorable Court for a rehearing herein of the decision on appeal, upon the following grounds, to-wit:

1. This Honorable Court has misconceived the facts of this case and based its opinion and decision herein upon matters and statements which are not in evidence as to and not a part of the record against appellant, Phillip Himmelfarb;

2. This Court has disregarded the understanding and agreement made and had between the trial court, counsel for the government, and counsel for the re-

spective defendants throughout the trial of this case from its very commencement, that all evidence offered by the government and received in evidence, is offered and received against defendant Sam Ormont only, unless government counsel avowed or indicated that the evidence is offered against the appellant Himmelfarb, or against both defendants;

3. This Honorable Court has misapplied the law to the actual facts of this case, as disclosed by the record against appellant herein, and disregarded the legal principles governing appellate courts in the review of judgments made and entered and proceedings had in a criminal action;

4. This Honorable Court has failed to adequately consider a number of the points raised by this appellant in his appeal herein, and has made assumptions which may not properly be made in a criminal proceeding, and drawn inferences which did not reasonably or logically follow from any established fact or facts.

Implicit in the very nature and purpose of a petition for rehearing is criticism of the decision made or rendered by the Court. The criticism herein leveled at the opinion and decision of this Court springs from a deep and abiding conviction that the appellant was not fairly tried nor justly convicted, and that the decision of this Court in affirming the judgment is grievously erroneous. The sincerity and earnestness of appellant may have prompted him to present this petition with much forcefulness and great vigor. However, this petition and the criticism of the opinion and decision therein contained, is presented and made with due respect and deference to this Honorable Court.

I.

This Honorable Court Has Misconceived the Facts of This Case and Based Its Opinion and Decision Herein Upon Matters and Statements Which Are Not in Evidence as to and Not a Part of the Record Against Appellant, Phillip Himmelfarb.

Appellant has carefully read the opinion of this Court and meticulously compared the facts therein set forth with the evidence in the record against appellant as disclosed by the testimony and exhibits. Such comparison has led appellant to the sincere and earnest belief in the truth and accuracy of the foregoing statement.

Thus the Court states as a fact (Op. p. 2):

“The books of the Acme Meat Co. were kept on a calendar year basis.”

The only testimony in the record respecting the basis, as to fiscal or calendar year, upon which the books of the Acme Meat Co. were kept was that given by government witness, Ernest Link, and the record with respect thereto discloses the following [Tr. Vol. I, p. 450]:

“Q. (By Mr. Strong): As far as you know from the books and records, or any other basis of knowledge you may have, was the Acme Meat Company operated on a calendar year basis, or a fiscal year basis during the years 1942, 1943 and 1944?

Mr. Katz: Objected to, if the Court please, as to that question, insofar as the defendant Himmelfarb is concerned—

Mr. Strong: We have agreed as to each question. I have not mentioned his name.

The Court: The objection will be sustained. The jury will receive this evidence as against the defendant Ormont only, and disregard it as to the defendant Himmelfarb.

The Witness (Mr. Link): On a calendar year basis.

The Court: It will be assumed that objection will be made to each question, and the same ruling made, as to each one, unless the prosecutor avows that it is offered for connecting the defendant Himmelfarb, or it is obvious from the question that it applies to the defendant Himmelfarb.

Q. (By Mr. Strong): On what basis? A. On the calendar year basis.

Q. On what basis were the books of the Acme Meat Company kept for the years 1942, '43 and '44?

A. On a calendar year basis.

Mr. Strong: That is all.

The Court: Cross-examine."

It is obvious from the aforequoted portion of the record that the evidence therein respecting the basis upon which the books of the Acme Meat Company were kept was not admitted as against appellant Phillip Himmelfarb, but was expressly excluded and admitted only against his co-defendant, Sam Ormont. Notwithstanding this fact, this Court in its opinion makes the aforequoted statement as a fact established by the record against appellant, Phillip Himmelfarb, as well as against his co-defendant, Sam Ormont.

Again, this Court in its opinion states as a fact (Op. p. 2):

"According to the evidence, income from sales of meat, made within ceiling prices under OPA, were reported on invoices and recorded in the company books and appellants' returns for 1944 were based on these figures. It is indicated that 'bonus' or 'overceiling' payments of additional cash sums paid by customers of Acme Meat Co. were received but

not reported on the books nor were they reported for income tax purposes for the year 1944; as to all of which both appellants were well aware.”

The only witness who testified respecting the phase of the case which in any way pertained to the matters stated as “facts” by this Court in the aforequoted portion of the opinion, was government witness, Ernest Link. Only a meager portion of his entire testimony was admitted against this appellant, and if such portion so admitted against this appellant is properly delineated from the transcript, this Court must determine that the matters set forth by it as facts, in the aforequoted portion of the opinion, are not borne out by or supported by the record.

A fair and accurate evaluation of such testimony discloses no evidence showing, or from which any inference can be drawn which will support such statement recited as a fact by this Court in its opinion (p. 2).

There is not a scintilla of evidence against appellant Himmelfarb respecting the prices or any other entries made by appellant Himmelfarb on the invoices which Mr. Link testified he saw Himmelfarb making out to customers, nor is there a shred of evidence that the invoices which Mr. Link testified he saw Himmelfarb making out to customers were or were not recorded in the company books. Likewise, there is not a particle of evidence that the returns of this appellant for the year 1944 were based on the figures which were “recorded in the company books.” Such statements in the opinion of this Court are based wholly upon assumption, conjecture and speculation.

Similarly, there is not a shred of evidence in the record against appellant Himmelfarb showing, or from which an inference may be drawn respecting “bonus or overceiling

payments.” The only testimony in the record upon which this Court could possibly have based its statement that “bonus or overceiling payments of additional cash sums paid by customers of Acme Meat Co.,” etc., is that of Mr. Ernest Link that [Tr. pp. 430, 434, 435]:

“I saw him compute the weight of the bill with the figure 3, and enter the amount on a list which was kept in the drawer of that desk.

Q. (By Mr. Strong): What desk? A. Of the desk of the Acme Meat Company, in the office.”

* * * * *

“Q. (By Mr. Strong): What did you observe in connection with that list? A. I saw on the list the names of customers and the amounts placed opposite those names of the customers. Sometimes they were written in the handwriting of Mr. Himmelfarb, and sometimes in the handwriting of Mr. Ormont. Some of them were marked ‘Paid’ and crossed out; some of them were left open, and not crossed out.”

* * * * *

“Q. Did you record any of the amounts from that list you have spoken of into the books and records which you kept of the Acme Meat Company? A. No.

Q. (By Mr. Strong): With reference to Mr. Himmelfarb—

The Court: Did you ever examine that list? A. That one time.

Q. One time? A. Yes.

Q. You say there were names of people on the list? A. Yes.

Q. And figures? A. Yes, I had half an hour’s time to study it.”

It should be observed that in order for this Court to have arrived at the conclusion that such testimony “indicated” what the Court found to be “indicated” thereby, this Court was required to make and did make a number of dehors the record assumptions:

- a. The assumption that the multiplication of the weight by the figure 3 resulted in a monetary total;
- b. That such monetary total was an additional charge to and paid by the customer, rather than a discount or rebate allowed and paid to the customer;
- c. That such computation was part of a transaction between the Acme Meat Co. and the customer, and not a record of account between the Acme Meat Co. and a third person, such as the amount due to the slaughterer for slaughtering of the head of beef, or the extra services in connection with the slaughtering thereof (see Opinion, Second Para., pp. 11-12); or the amount or percentage due to a sales manager or salesman or cattle buyer in connection with the sale by Acme Meat Co. of the particular beef, or commission due the cattle buyer for the purchase thereof on behalf of Acme Meat Co.

In short, this Court assumed a hazy, nebulous reference to an unexplained record to be a record of income rather than a record of expense and outgo, without any evidence whatever to support such assumption, in violation of every fundamental rule governing criminal proceedings, including the basic tenet of our system of jurisprudence that every person is deemed to be innocent of crime and wrongdoing.

It appears to appellant that the use by the Court of the word “indicated” in the statement that “It is indicated

that 'bonus' or 'overceiling' payments of additional cash sums paid by customers of Acme Meat Co. were received but not reported," etc., concedes by implication, at least, that the evidence does not directly establish same as a fact. The word "indicated," among other things, connotes "hint" and "suggestion." However, if what the Court says is "indicated" by the evidence is merely "hinted" or "suggested" thereby, then speculation and surmise becomes and is the sole pathway to the conclusion.

Moreover, by assuming that "both appellants were well aware" of what this Court assumed the evidence "indicated," the Court piled mere guess upon simple assumption.

This Court in its opinion states (pp. 2-3):

"Further, there is testimony that income from certain sales was shown on invoices which were not transmitted to the appellants' bookkeeper and therefore were never entered nor included in the books from which the income returns were made. These unreported invoices or lists were kept in a desk drawer at the plant. There is also indication of some falsity in keeping of records which goes to the general intent of appellants to misrepresent their income."

A careful review of all of the testimony of Mr. Link which is in the record against appellant Phillip Himmel-farb, and which is the only testimony that in any way pertains to the phase of the case bearing upon the matters included in the foregoing quotation from the opinion of this Court, establishes that such statement is a mere extension of an unsupported and unsupportable assumption dehors the record made by this Court.

Preliminarily, however, to any further discussion of the aforequoted statement, appellant respectfully directs this Court to the confusion which results from the designation by this Court of the "lists" as "invoices" or "unreported invoices," or vice versa. The only witness who testified respecting a "list" was government witness Link, who referred to it by that term "list." He did not at any time refer to the "list" as an "invoice," nor to any "invoice" or "invoices" as a "list." Nor was any reference at any time made by anyone to a "list" as an "invoice," or vice versa. The testimony of Link respecting the "list" is in the record against appellant Himmelfarb, and may properly be considered by this Court for what it is worth.

On the other hand, there is testimony in the Reporter's Transcripts [pp. 398-401, pp. 416-417], with respect to unrecorded invoices for the year 1942, which is not in the record against appellant and is only in evidence against defendant Sam Ormont. The distinction between the "list" and "unrecorded invoices" is vital to appellant for many reasons, among which are:

1. If the Court by its reference to "unreported invoices or lists" is indiscriminately referring to both the "unrecorded invoices" and the "list," it is, with respect to the unrecorded invoices, considering and applying against appellant Himmelfarb as evidence matters and things which are not in the record against him at all;

2. If the Court by its reference to unreported "invoices or lists" is indiscriminately referring to both the "unrecorded invoices" and the "list," this Court, in violation of appellant's most basic rights, is disregarding the hereinbefore mentioned understanding and agreement made and had by and be-

tween the trial court, counsel for the government and counsel for the respective defendants, under and pursuant to which this case was tried and determined;

3. This Court by designating a "list" as an invoice or unreported invoices, affixes and attaches to the word "list" a meaning and connotation which the word "list" does not have, possess, or convey, to appellant Himmelfarb's serious and irreparable detriment. The word or term "invoice" means "a written account, or itemized statement, of merchandise shipped or sent to a purchaser, consignee, factor, etc., with the quantity, value or prices, and charges annexed," and refers to sale, which implies income, and when the term "invoice" is modified by the adjective "unreported," such invoice is designated and characterized as one which has not been entered on, is not reflected by the books, and has not been included in and declared as income. A list, on the other hand, is "a roll or catalog, as of names or items; a register, inventory, or classified record or memorandum," and does not denote income or necessarily have any connection with or pertain thereto.

The importance of this distinction is emphasized by the Court's further statement in its opinion immediately following its reference to "unreported invoices or lists" that (p. 3), "There is also some indication of some falsity in keeping of records which goes to the general intent of appellants to misrepresent their income." Obviously, the existence of "unreported invoices" would have the effect declared by the Court. The keeping and existence of a mere list could and would have no such effect.

The record does establish, it is true, that a list was kept in a desk drawer of the plant, and that Mr. Link did not record any of the amounts from that list in the books and records of the Acme Meat Co. However, the evidence does not show, and this Court merely assumes that the list represented a record of business transactions from which book entries are required to be made, and not a mere computation based upon or made from, or an analysis of some primary record, and from which no entry or postings are required to be made in the ordinary and regular course of keeping books and records.

The Court must distinguish between vouchers and memoranda resulting in accounting entries and those which have no affect upon the books and records of a business, and it is undoubtedly the failure to recognize such distinction which led the Court into the unwarranted and erroneous assumption that there was an "indication of some falsity in keeping of records."

This Court in its opinion (p. 3) makes a statement that:

"Evidence is in the record of a partnership return declaring additional income of some \$71,000.00, claimed to have come from the so-called 'Miscellaneous Enterprises,' bank records and bank documents pertaining to each appellant, records of business dealings, invoices, cancelled checks, transcripts of portions of the records of the Acme Meat Co. and bond records."

There is no evidence in the record against appellant Himmelfarb of any "invoices" or "transcripts of portions

of the records of Acme Meat Co.," nor for that matter, of "bond records," unless, of course, this Court construes the inclusion in appellant Himmelfarb's statement of net worth of the value of his war bonds as an asset as a "bond record(s)."

Moreover, even the bank records and bank documents and records of business dealings and cancelled checks which are in evidence against appellant, Himmelfarb, were not in any way ever connected up with the offense with which he was charged, and consequently are not only improperly in the record, but actually constitute no evidence at all.

As a matter of fact, this Court conceded that the bank records were not connected with the charge of which appellant was accused, by declaring with reference thereto (Op. p. 36):

"In considering the evidence, it is doubtful whether the government properly connected this evidence with the offense charged; . . ."

This statement of the Court may with equal propriety be applied to all of the other evidence received against appellant Himmelfarb.

This Court on page 29 of its opinion, and in that portion of it designated "Specifically as to Himmelfarb," states:

"Mr. Eustice and Mr. Phoebus, agents for the Bureau of Internal Revenue, began investigations in November, 1945, to determine Himmelfarb's status with the Acme Meat Co., and whether he had paid

the proper tax for the year 1944. On the basis of these investigations, Eustice determined that Himmelfarb had received additional unreported income for that year."

By such conclusion it is apparent that this Court rejected the contention and argument made by appellant Himmelfarb (Rep. Br., pp. 14-16, incl.) that Eustice had merely testified that he had made a determination on the basis of his investigation as to whether or not there was any additional income for the year 1944 over and above that reported by appellant, but that Eustice did not by his testimony disclose what such determination was—that is, whether he had determined that there was such additional income or whether he had determined that there was no such additional income.

Because appellant verily believed that his contention was tenable and that this Court would so construe such testimony, appellant made and advanced no contention on the basis of a contrary interpretation. Counsel for appellant would be remiss in his duty if he did not now direct this Court's attention in the strongest possible manner to the fact that the statement by Mr. Eustice, if construed as testimony that appellant received additional unreported income for the year 1944, not only represents the bald conclusion of an investigator respecting the primary issue in this criminal proceeding, but a conclusion based upon hearsay and matters dehors the record, and which was improperly admitted over the timely objection of appellant.

As a matter of fact, this Court impliedly, at least, recognized such conclusion to be based upon hearsay and matters dehors the record by the following statement, and particularly the italicized portions thereof which are quoted from the opinion of this Court (last para., pp. 29-30):

“Eustice, in determining that appellant had additional income for the year 1944, used information secured from his individual income return for that year, the 1945 partnership return, *investigation of the books and records of the Acme Meat Co., and information from the statements of other government agents.*”

This is true for a number of reasons:

a. No books or records of the Acme Meat Co. are in evidence in this case at all; no evidence respecting the contents of any books or records of Acme Meat Co. were admitted against appellant Himmelfarb, and the testimony of Mr. Eustice based upon his investigation of such books and records is, of necessity, a conclusion based upon matters and things dehors the record;

b. There are no “statements of other government agents” of any kind or character in evidence against appellant Himmelfarb, and information from the statements of other government agents is, and can only be hearsay as well as dehors the record.

The decision of this Court sanctioning an opinion and conclusion of an investigator based upon hearsay and matters dehors the record, directed to the primary issue upon which the jury was required to find, as a fact, and

the affirmance of the judgment upon such testimony, represents a radical and dangerous departure from established legal principles and precedents.

Expert testimony in income tax cases directed to the primary issue upon which the jury must find, *viz.*, whether there has been additional unreported income, has been sustained by the Supreme Court of the United States upon the ground that the witness was qualified as an expert, *and based his opinions and conclusions upon the testimony and exhibits in evidence.*

United States v. Johnson, 63 S. Ct. 1233, 319 U. S. 503, 519;

See, also:

United States v. Schenck, 126 F. 2d 702, 709;

Rose v. U. S., 128 F. 2d 622.

No case has been cited by the government or this Court, and counsel for appellant is convinced that no case can be found in which the opinions and conclusions of an investigator, based upon hearsay and matters *dehors* the record, has been sanctioned or sustained.

To permit such evidence to stand and to constitute the basis for a conviction in a criminal proceeding, and the affirmance of a judgment of conviction upon review by an appellate court, is violative of every fundamental principle of American jurisprudence.

II.

This Court Has Disregarded the Understanding and Agreement Made and Had Between the Trial Court, Counsel for the Government, and Counsel for the Respective Defendants Throughout the Trial of This Case From Its Very Commencement, That All Evidence Offered by the Government and Received in Evidence, Is Offered and Received Against Defendant Sam Ormont Only, Unless Government Counsel Avowed or Indicated That the Evidence Is Offered Against the Appellant Himmelfarb, or Against Both Defendants.

There is and can be no dispute that this case was tried upon the agreement and understanding above mentioned. Excerpts from the transcripts embodying the understanding and agreement, and illustrative and indicative of the tenor thereof were set forth in appellant Himmelfarb's Opening Brief (pp. 3-4), and such understanding and agreement is and must be deemed to be an admitted fact.

Notwithstanding such fact this Court, as hereinbefore and as hereafter shown, has repeatedly referred to, considered and applied against appellant Himmelfarb evidence which was not admitted against him and which was not in the record at all as to him. This Court has gone even further. It has found and declared appellant Himmelfarb guilty by association. This Court said with respect to the two defendants (Op. p. 38):

"The two were trial (*sic.* tried) together and the two ran a business together, and for the most part acted jointly throughout so that most of the evidence in conduct of that business would be properly related to both defendants."

It thus shockingly appears that this Court considered the fact that the two defendants were tried together as an element determinative of the proposition that most of the evidence would be properly related to both defendants, even though most of the evidence was not admitted against appellant Himmelfarb, but expressly excluded from the record as to him.

Similarly, this Court considered the fact that the two defendants ran a business together as another element determinative of the proposition that most of the evidence would properly be related to both defendants, even though most of the evidence was not admitted against appellant Himmelfarb, but expressly excluded from the record as to him.

In short, notwithstanding the fact that the evidence respecting the conduct of the business operated by appellant Himmelfarb and Sam Ormont is not in the record against this appellant, this Court, in the face of the record and contrary to the most basic and inviolable legal principles, nonetheless applies against and relates to appellant Himmelfarb all such evidence simply on the basis that the two defendants were tried together and ran a business together.

III.

This Honorable Court Has Misapplied the Law to the Actual Facts of This Case, as Disclosed by the Record Against Appellant Herein, and Disregarded the Legal Principles Governing Appellate Courts in the Review of Judgments Made and Entered and Proceedings Had in a Criminal Action.

A. Re: The Privileged Communications by Appellant and Appellant's Attorney to Malin, the Accountant.

This Court in its opinion herein held that the testimony of William S. Malin, the accountant employed by appellant Himmelfarb's attorney, Mr. Mirman, were not privileged communications and therefore inadmissible as such, upon two grounds:

1. That "Malin's presence was not indispensable in the sense that the presence of an attorney's secretary may be; it was a convenience, which, unfortunately for the accused, served to remove the privileged character of whatever communications were made"; and
2. That Himmelfarb, being aware of Malin's employment, by participating in one or more meetings with Malin and Mirman relative to his income taxes and signing some exhibits at Malin's request, thereby authorized the disclosures by Mirman to Malin.

In so holding this Court fell into serious error respecting an important and far-reaching principle of law, and rendered a decision directly contrary to the only adjudicated Federal Court case on the point, to-wit: *Lalance*

& Grosjean Mfg. Co. v. Haberman Mfg. Co., 87 Fed. 563, and contrary to the law generally prevailing in the several states, as well as at common law.

In that case it is held that the rules of privilege applicable to communications between attorney and client, or counsel and associate, govern communications of a party to patent litigation, or his counsel, with an expert in the art in question employed by the party to manage the litigation in his behalf, or with such an expert employed as assistant to counsel insofar as he acts as such assistant and not as a witness.

In that case the complainants had employed an expert to assist complainants in the presentation of their patent litigation. In determining whether or not a letter written by complainants to such expert was privileged, the Court declared:

“In such a case the expert would be in reality, so far as litigation upon the particular patent was concerned, the *alter ego* of the complainant; and the privilege which public policy secures to the individual litigant could not be secured to the corporation litigant unless it was so extended as to include him. So too, questions of science and art are frequently so mingled with questions of patent law, in controversies arising upon some patent, that a party substantially retains an expert to conduct the case almost as associate counsel with the solicitor. In such case it would seem fair to apply the same rule to the expert as to the counsel. It would seem, however, that in such case the privilege should be lost when the expert ceases to act as counsel, and allows himself to be made a witness; at least, to the extent to which he testifies.”

The Court in that case further declared:

“It does, however, appear that he was retained by plaintiffs as an expert to assist them in the presentation of their case. As such the witness did seem to come within the privilege suggested in the former memorandum—as similar to that of counsel. More careful reflection has still further confirmed the impression that such privilege should be forfeited if the ‘scientific counsel’ assumed the role of a witness.”

In *Walshon v. Stainton*, 71 Reprint 357, 2 Hem. & M. 1, it was directly held that communications by an attorney and the client to an accountant employed by the attorney were confidential communications and privileged as such, declaring:

“The principle is established that where a person has occasion to employ a solicitor, and the solicitor, in order to enable himself to advise on the matter, calls in some other person to assist him and to give his opinion, such communications are as much privileged as if they came from the solicitor himself. In such a case the person called in (here it was an accountant) is *pro hac vice* the solicitor’s clerk.”

Indispensability of the clerk or agent is not the test which determines whether the communication is privileged or unprivileged, and this Court’s conclusion that the presence of the accountant was a mere convenience which removed the privileged character of the communications, is contrary to precedent and unsupported in law.

It has been repeatedly held that the privilege extends to confidential communications between the client and the

clerk or agent of the attorney, which, as hereinabove shown, includes an accountant.

Bowman v. Norton, 5 C. & P. 177, 24 E. C. L. 265, 172 Reprint 929;

Taylor v. Forster, 2 C. & P. 195, 12 E. C. L. 85, 172 Reprint 89;

Churton v. Frewen, 2 Dr. & Sm. 390, 62 Reprint 659, 670;

Hawes v. State, 7 So. 302, 312, 88 Ala. 37;

Landsberger v. Gorham, 5 Cal. 450, 451, 452;

Indianapolis v. Scott, 72 Ind. 196, 204;

Sibley v. Waffle, 16 N. Y. 180, 183;

Brand v. Brand, 39 How. Fr. 193, 260, *et seq.*;

Jackson v. French, 3 Wend. 337, 20 Am. D. 699, 700.

It will be noted by this Court that in *Churton v. Frewen*, *supra*, the rule of privileged communications was held to apply to a translator of ancient documents, who was employed by the solicitor for that purpose; that in the *Lalance, etc., v. Haberman* case, *supra*, the privilege was held to apply to an engineer or patent expert employed by the party to assist in the preparation and presentation of its case.

Can this Court say that a translator of ancient documents is more indispensable and less of a convenience in a case requiring the services of such a translator than an accountant in a case requiring the services of an accountant? Similarly, can this Court say that an engineer or patent expert is more indispensable and less of a con-

venience in a case requiring the services of such engineer or tax expert than an accountant in a case requiring the services of an accountant? It should be remembered, moreover, that in *Walshon v. Stainton, supra*, the privilege was specifically held to apply to an accountant employed by an attorney.

The privilege likewise extends to confidential communications between the principal's attorney and the clerk or agent of such attorney, and prevents the agent, as well as the attorney from testifying thereto.

McFarlane v. Rolt, 14 Eq. 580, 27 Law Times Reports, 305, 306;

Ried v. Langlois, 2 Hall. & T. 59, 73, 47 Reprint 1596, 1602;

Russell v. Jackson, 9 Hare 387, 41 Eng. Ch. 387, 68 Reprint 558, 559;

Webb v. Lewald Coal Co., 4 P. 2d 532, 214 Cal. 182, 187, 77 A. L. R. 675;

Philadelphia Fire Assn. v. Fleming, 3 S. E. 420, 422, 423, 78 Ga. 733;

Indianapolis v. Scott, 72 Ind. 196, 204;

Leyner v. Leyner, 98 N. W. 628, 629, 123 Iowa 185;

State v. Loponio, 88 Atl. 1945, 85 N. J. Law 357, 361, *et seq.*, 49 L. R. A. (N. S.) 1017;

LeLong v. Siebrecht, 187 N. Y. Supp. 150, 196 App. Div. 74, 76.

In none of the foregoing cases was indispensability of the presence of the clerk or agent declared to be or even mentioned as the test for the existence of the privilege, or mere convenience fixed or determined as the basis for

the loss of such privilege, nor was the fact that the client was aware of the employment of the clerk or agent or participated in meeting or communicating with such clerk or agent, held to be a waiver of the privilege or an authorization to disclose the communications. As a matter of fact, such cases indicate that it is the awareness by the client of the existence of the relationship of clerk or agent in making the disclosure which furnishes the basis for the privilege.

Moreover, the question before this Court is not whether the "disclosures made by Mirman to Malin" were authorized by the accused, but whether Malin may disclose to any person communications, either orally or in writing, made to him in confidence by the accused, or by Mr. Mirman, the then attorney for appellant.

Rule 26 of the Federal Rules of Criminal Procedure, 18 U. S. C. A. (following Sec. 687) provides:

"The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

Under the common law, as hereinbefore shown, the rule of privileged communications extended to clerks and agents of the attorney, which includes accountants when so employed by the attorney.

As indicated by the foregoing cases, the test that this Court should have applied in determining whether the communications to Mr. Malin were privileged, and therefore inviolate, was whether he was, in fact, an agent of the attorney for the accused. By the failure of this

Court so to do, and the use by it of a false and incorrect test or standard of measurement, this Court was led to a conclusion completely at variance with the adjudicated cases on this question and the law generally prevailing:

B. Re: The Error in the Admission of the Bank Records.

This Court in its consideration of appellant's contention that the admission of the bank records over objection of appellant was error, states (Op. p. 36):

"The bank records, over objection of Himmelfarb, were admitted to show income for the year 1944 and, along with other evidence in the case, constituted a part in the chain of circumstances proving guilt."

By such statement this Court considered such evidence as being properly in the record and entitled to consideration as part of the circumstantial chain of proof.

In the very next sentence of its opinion, however, the Court declares that even if the admission were assumed to be in error, it was harmless error and appellant was not prejudiced thereby. In the sentence immediately following the foregoing declaration the Court acknowledges that the government argued to the jury that such bank records "show how much money came into appellant's account," and then states with respect thereto in the next succeeding sentence that (Op. p. 36):

"In considering the evidence, it is doubtful whether the government properly connected this evidence with the offense charged; however, in the circumstances we do not find reversible error. Eustice, who examined the account, stated that he did not actually use it in the computation of the taxpayer's income as corrected, but only for informational purposes."

There is and can be no question whatever that the government did not connect, even remotely, the bank records with the offense charged, and the error of the admission of such evidence, over objection, and the subsequent refusal to strike same upon motion of appellant, cannot be justified on the basis as to whether or not Mr. Eustice did or did not use such evidence in the computation of the taxpayer's income, but must be determined solely on the basis of whether the jury considered such evidence in arriving at their verdict, as it was urged to do by counsel for the government in his argument to them.

Where, as in the instant case, this Court cannot say that the jury did not consider such evidence in arriving at its decision, such evidence must be deemed to be prejudicial.

Kattrell v. U. S., 79 F. 2d 259, 262, and *Williams v. U. S.*, 168 U. S. 382, 395, 396, 397, flatly hold that the admission of bank records without any evidence connecting same with the offense charged is error, and the latter case holds that such error is reversible error where the accused *may* have been prejudiced thereby.

It appears to appellant that this Court is inconsistent in holding, as it does, that although it is doubtful whether the government properly connected up the bank records with the offense charged, any error in such admission was harmless and not prejudicial because a government witness Eustice testified that *he did not use* it in the computations made by him, but that such evidence nonetheless constituted a part in the chain of circumstances proving guilt.

In *Nicola v. U. S.*, 72 F. 2d 780, 782, 783, the Court had occasion to pass upon the error in the admission of

a letter, which like the bank records in the instant case, was not shown to be relevant or material to or connected up with the offense charged, and said with respect thereto (p. 783):

“Its admission was clearly erroneous, and unless it appears ‘beyond a doubt that the improper evidence admitted did not and could not have prejudiced the rights of the parties duly objecting,’ a new trial should be awarded.”

In *Eierman v. U. S.*, 46 F. 2d 46, 49, the Court held that in jury trials the erroneous admission of evidence is presumptively injurious and warrants a reversal unless it affirmatively appears that it was harmless.

It has repeatedly been held that it is not necessary for an appellant to show that the error relied upon was prejudicial, and where substantial error occurred which, within the range of reasonable possibility may have affected the verdict of the jury, it is ordinarily presumed to be prejudicial and to require reversal.

The rule that should govern the Court in the determination of this case is that laid down in *Antietam Paper Co. v. Womble*, 294 Fed. 795, 798, wherein it was held that the Court will not assume that incompetent evidence improperly admitted was without affect upon the jury where it was of such a character as to have a material bearing on the principle issues.

This Court in citing and quoting from *Gleckman v. United States*, 80 F. 2d 394, 399, to support its holding with respect to the admission of the bank records as evidence, misapplies the law of that case to the facts of the instant proceeding. It was not shown in this case, as in the *Gleckman* case, that defendant was “constantly day by day and month by month receiving moneys and de-

positing them to his own use,” nor was there any evidence here, as in the *Gleckman* case, to prove that such deposits as were made in appellant’s bank account represented income which was not accounted for, or income at all.

C. Re: The Insurance Policy—Exhibit 44.

It is apparent from the Court’s statement (Op. pp. 36-37) that:

“The evidence further shows that Himmelfarb acted somewhat irregularly in transferring the policy from himself to Sam Ormont and himself, doing business as Acme Meat Co., which bears upon his general conduct in business and sheds light on the element of intention,”

that the Court misunderstood appellant’s contention and argument with respect thereto, in view of the fact that the Court finds that the evidence established appellant and Sam Ormont to be partners in the conduct and operation of the Acme Meat Co. There is and was no irregularity in the transfer of such policy if appellant and Sam Ormont were actually partners. The irregularity in the transfer of the policy existed only if the transfer was made by appellant from himself to Sam Ormont and himself, as partners, if in fact they were not partners, but were employer and employee.

Counsel for the government in his argument to the jury [Tr. pp. 1484-1485], stressed the irregularity of the transfer of the policy, Exhibit 44, to the partners, on the basis that the relationship was otherwise, declaring:

“So there is evidence in this case right at the outset that Mr. Himmelfarb is also not telling everything. That you can take into account in determining not

only what his relationship was to Mr. Ormont and what part of that money was his and what he got, but also can take that into account in determining willfulness. Willfulness is a very important term here, as his Honor will tell you more about later. *But bear in mind these little indications of willfulness. It doesn't say on his return that he is a co-partner, it says here that his employer is Sam Ormont, doing business as Acme Meat Company."*

Irrespective of what the insurance policy and statements and the monthly reports in connection therewith may have shown, there can be no question that such insurance policy and reports had no connection with or relationship to the payment of income taxes.

D. Re: The Net Worth Statements—Exhibits 50 and 50A.

This Court appears to justify the admission in evidence of the net worth statements, over objection, on the basis that:

(1) The trial court did not hold the mere possession of assets as the basis for the verdict herein; and

(2) The net worth statements were pertinent in establishing an accumulation of income, and therefore relevant.

Appellant is unable to comprehend the significance of this Court's statement that the trial court did not hold that the mere possession of assets was the basis for the verdict herein. There was never any occasion for the trial court to so hold, and there was no issue before the trial court respecting the basis for the verdict.

What significance or importance the trial court attached to the net worth statement is of no moment whatever in this case. The real question is what significance or importance did the jury attach to these net worth statements?

Because this Court is unable to probe the minds of the jurors and determine that question, the error in the admission of such statements, under the authorities both heretofore and hereafter cited, is real and prejudicial.

A mere net worth statement in and of itself does not establish the source or origin of the assets shown, and consequently in and of itself is not pertinent in establishing an accumulation of income. That is true of the net worth statements, Exhibits 50 and 50A received in evidence herein.

Admittedly, there is no testimony respecting the source or origin, or the period during which the assets were acquired which are shown by and reflected in the statement of net worth. This Court by its assertion that the net worth statement is merely a part of the evidence which goes to show appellant Himmelfarb's income in the general period involved, establishes that it momentarily lost sight of or misconceived the nature, purpose or effect of a net worth statement. A net worth statement does not show income at all, but merely assets, liabilities, and the excess of one over the other as of a given date.

This Court has fallen into the same error into which the jury was led by the admission in evidence of the statements of net worth, and the urging by counsel for the government that the jury fasten guilt upon appellant upon the basis of the statements of net worth and their speculation and conjecture as to the manner and method in which he acquired such net worth.

The Court declares (Op. p. 37):

"The case is quite clear that Himmelfarb had a large source of income in 1944 and that his general conduct suggests and proves evasion of taxes thereon in the proper period."

The Court, however, appears to find this case “quite clear” upon the basis of exhibits received over objection, and whose admission at least in part is justified only on the basis that it did not create such prejudice as would amount to reversible error.

IV.

This Honorable Court Has Failed to Adequately Consider a Number of the Points Raised by This Appellant in His Appeal Herein, and Has Made Assumptions Which May Not Properly Be Made in a Criminal Proceeding, and Drawn Inferences Which Did Not Reasonably or Logically Follow From Any Established Fact or Facts.

**A. Re: The Application for and Cashier's Check—Exhibits
34 and 35.**

The Court fails entirely to consider appellant's contention respecting Exhibit 35, the cashier's check payable to Acme Meat Co., issued upon the application, Exhibit 34, of appellant's wife, which did not and could not under any circumstances represent income at all, or in any wise be relevant to the offense of income tax evasion. To hold that a number of irrelevant and unconnected documents may be admitted in evidence and the jury invited to consider same in arriving at guilt, which consideration can only involve surmise, speculation and conjecture is not prejudicial, is to ignore reality.

**B. Re: Misconduct of Counsel for the Government in
Argument to Jury.**

A part or portion of the argument of counsel for the government which is cited as misconduct herein by appellant is excused and justified by this Court on the basis that such part or portion of the argument was based upon

the evidence in the case and that which may reasonably be inferred therefrom. Such justification must of necessity follow in light of the fact that this Court has fallen into the same error of applying against appellant Himmelfarb evidence which is not in the record at all, as well as evidence which was admitted only as against his co-defendant Sam Ormont.

This Court does, however, recognize in some respects at least the impropriety of a part or portion of the argument made by counsel for the government, and states in its opinion with respect thereto (Op. p. 39):

“We do not think that counsel for government should have used this failure to produce certain witnesses or to have drawn it to the jury’s attention, for he was in no way bound to produce them.”

However, this error too is excused by the Court because of a lack of prejudice and objection.

This Court acknowledges that under the rule of *Skuy v. U. S.*, 261 Fed. 316, that where error is seriously prejudicial it will be noticed by the reviewing Court in the absence of objection. The question then becomes one of whether or not such an error is seriously prejudicial. Certainly an argument by counsel for the government that two persons were accessible as witnesses to appellant and were not called by him, and implying and inferring that they would have given testimony adverse and prejudicial to appellant if called, results in the deprivation of the presumption that the defendant is innocent to the same extent and degree as does an argument directed to the fact that the defendant did not himself take the stand.

It has been repeatedly held that an argument of government counsel calling the attention of the jury to defendant's failure to take the stand is reversible error.

**McKnight v. U. S.*, 115 Fed. 972, 982;

Robilio v. U. S., 291 Fed. 975, 985.

In the *McKnight* case the Court held that it was prejudicial error for the Court or counsel to call to the attention of a jury in a criminal case in any manner the right of the defendant under the statute to testify in his own behalf. In the *Robilio* case, the Court held that remarks by the District Attorney manifestly designed to direct the attention of the jury to the failure of the defendant to testify would constitute reversible error unless otherwise overcome.

Anent the question of excusing or justifying improper argument of government counsel on the theory that it was invited or provoked by argument of counsel for defendant, it was held in *United States v. Toscano*, 166 F. 2d 524, 526, 527, in a prosecution for unlawfully possessing narcotics, that the summation of government counsel that a package which contained the narcotics might show defendant's fingerprints was improper, even though provoked by reference by defendant's counsel to facts outside the record, where government introduced no evidence to show any fingerprints, and the error was not eliminated

*This case is not the same as, but is the decision on the second appeal of the case of *McKnight v. U. S.*, 97 Fed. 208, cited in appellant Himmelfarb's Opening Brief.

by the judge's statement that the jury was to decide the case only on the evidence.

In *Richardson v. U. S.*, 150 F. 2d 58, 64, the Court, in considering improper argument by counsel for the defendant, declared:

“Whether or not these appellants are guilty is not for us to decide, and as above indicated, there is sufficient evidence to support submission to the jury of the first count of the indictment. Appellants, however, were entitled to a fair trial, and they did not receive it.”

See, also, *Taliaferro v. U. S.*, 47 F. 2d 699, in which this Court analyzed in detail and extensively discussed the position of counsel for the government and his scope and duties in the argument of a criminal proceeding, and in an opinion written by Judge Sawtelle, in which Wilbur and Rudkin concurred, reversed the case because of improper argument.

While it is conceivable that one error of an inconsequential nature may be harmless and not prejudicial, the greater weight of probability and logic should lead to the conclusion that the accumulated effect of a number of errors must of necessity be harmful and prejudicial. In the instant case, there was not a single isolated inconsequential error, but a number of errors, and the effect thereof was the cumulative effect of the total.

The Supreme Court of the United States has in two comparatively recent cases had occasion to consider the question as to whether error was harmless or prejudicial.

In the most recent of these two cases, to-wit: *Fiswick v. U. S.*, 329 U. S. 211, the Court referred to its earlier but nevertheless late case of *Kotteakos v. U. S.*, 328 U. S. 750, in which it reviewed the history and function of the “harmless error” statute (Jud. Code, Sec. 269, 28 U. S. C. 391), and quoted therefrom as follows (pp. 764-765):

“If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.”

See, also,

United States v. Negro, 164 F. 2d 168, 171;

Bollenbach v. U. S., 326 U. S. 607, 615.

Specifically, with respect to the matter of improper argument by counsel for the government, the Court, in *Coulston v. U. S.*, 51 F. 2d 178, 182, in considering and discussing the proposition respecting the claim that the

conviction was upon abundant evidence, and that the errors complained of were not prejudicial, quoted with approval from *Miller v. Territory of Oklahoma*, 149 Fed. 330, 339, 9 Ann. Cas. 389, as follows:

“The zeal, unrestrained by legal barriers, of some prosecuting attorneys, tempts them to an insistence upon the admission of incompetent evidence, or getting before the jury some extraneous fact supposed to be helpful in securing a verdict of guilty, where they have prestige enough to induce the trial court to give them latitude. When the error is exposed on appeal, it is met by the stereotyped argument that it is not apparent it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is: that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless. As the appellate court has not insight into the deliberations of the jury room, the presumption is to be indulged, in favor of the liberty of the citizen, that whatever the prosecutor, against the protest of the defendant, has laid before the jury, helped to make up the weight of the prosecution which resulted in the verdict of guilty.”

Finally, this Court in its decision herein should be guided by the statement of the United States Supreme Court in the recent case of *Bollenbach v. U. S.*, 326 U. S. 607, 615:

“From presuming too often all errors to be ‘prejudicial,’ the judicial pendulum need not swing to

presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

Respectfully submitted,

WILLIAM KATZ,

Attorney for Appellant, Himmelfarb.

The undersigned attorney for appellant Phillip Himmelfarb hereby certifies that in his judgment the foregoing petition for rehearing is well founded, and is not interposed for delay.

WILLIAM KATZ.

No. 11,666

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

See v. 2482-2483
SAM ORMONT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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FILED

JUN 30 1949

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No. 11,666
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

SAM ORMONT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

Comes now the appellant, Sam Ormont, and respectfully petitions this Honorable Court to grant his petition for rehearing for the following reasons:

I.

Defendant Ormont Was Once in Jeopardy.

That the appellant Ormont's plea of once in jeopardy was well taken. Appellant Ormont had a vested right to be tried by the first jury that was duly impaneled, accepted and sworn—neither he nor his counsel raised any question as to the competency of said jury—made no objection to the reference by the prosecutor to the O.P.A. case—and made no motion, suggestion, or intimation to the court that said jury should be discharged—the prosecuting attorney made no motion or suggestion that the jury be discharged, therefore, so far as appellant Ormont was

concerned, the court was never called upon to exercise any “discretion” with respect to the competency of said jury to try said appellant, but notwithstanding appellant’s right to have said jury try his case the court deliberately dismissed the said jury without appellant’s consent and without the slightest cause for so doing.

The mere fact that a co-defendant (appellant Himmelfarb) through his counsel asked the court so far as he was concerned to dismiss the jury certainly was no justification for dismissing the jury as to appellant Ormont, and even if (which we question) the Judge was called upon or had a right to exercise any discretion with respect to appellant Himmelfarb’s motion that certainly could not have the slightest binding effect upon appellant Ormont, and did not justify the court in depriving appellant Ormont of his vested constitutional right to be tried by the jury he had selected and sworn as the jury to determine his guilt or innocence. The court might well have proceeded with that jury as to defendant Ormont and granted defendant Himmelfarb a right to another jury as there was not then and never was any justification for the joinder of the two defendants in the trial in any event as was subsequently demonstrated with the court acquitting appellant Ormont on all counts of the indictment save and excepting Count I, and acquitting appellant Himmelfarb on all counts, save and excepting Count II.

This court has properly held that appellant Ormont had a vested right in the first jury that was sworn to try him—that the swearing of the jury constituted “jeopardy”—that his counsel could not without express authority waive such right and did not attempt to.

Under the authorities and particularly cited in appellant’s opening brief on pages 88-93, including *Johnston v.*

Zerbst, 304 U. S. 458, 464; *Glasser v. United States*, 315 U. S. 60, 70; *Von Moltke v. Gillies*, 332 U. S. 708, 723; *McCrea v. Jackson*, 6th, 148 F. 2d 193, 197, the constitutional right of a defendant not to be placed in jeopardy but once is not to be frittered away and yet that was what was done in this case, and as was held in the case of *Cornero v. United States*, 9th, 48 F. 2d 69, there must be an *absolute necessity* before the court is justified in discharging a duly impaneled jury. In this case there was no absolute necessity; in fact there was *no necessity* to discharge the jury and the trial judge in passing upon the motion of appellant Himmelfarb to discharge the jury stated in substance that he believed no harm had been committed by the remark of the prosecutor and that he, the judge, having immediately instructed the jury to disregard the remark had cured any possible adverse effect, but finally he stated that it was possible (not probable) that he had not completely cured it and therefore with the express consent of the prosecuting attorney he discharged the jury, *but without any consent of appellant Ormont*. (Italics ours.)

• In the case of *Hunter v. Wade*, affirmed under the name of *Wade v. Hunter*, 336 U. S. 684, the Supreme Court adopted the rule laid down in the *Perez* case (*United States v. Perez*, 9 Wheat. 579, 6 L. Ed. 165) and based on the Manual for Court-martial, paragraph 75 A, together with the fact that the tactical situation brought about by a repeatedly advancing army was responsible for the withdrawal of the charges from the first Court-martial. The majority opinion in its closing, stated:

“This case presents extraordinary reasons why the judgment of the commanding general should be accepted by the courts.”

The rule laid down in the *Perez* case was quoted with approval as follows:

“ . . . We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a *manifest necessity* for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, *the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes* . . .” (Italics ours.)

In the case of *United States v. Potash*, 2nd, 118 F. 2d 54, 56, only eleven jurors returned to the court, and the court said:

“The inference is plain that one of the jurors was incapacitated to continue. Under such circumstances the court had discretion to discharge the jury . . .”

and therefore the court did exercise its discretion in accordance with the rule laid down in the *Perez* case as stated as one of the reasons where a jurist may exercise its discretion to discharge a jury before verdict and as stated in Wharton's Criminal Law, 12th Edition, Volume I, Section 395.¹

¹The only causes for which a jury duly impaneled and sworn to try an accused on a criminal charge can be discharged by the court without a verdict are (1) consent of the prisoner, (2) illness of (a) one of the jurors, (b) the prisoner, (c) the court, (3) absence of a jurymen, (4) impossibility of the jurors agreeing on a verdict, (5) some untoward accident which renders a verdict impossible, and (6) extreme and overwhelming physical or legal necessity.

The Supreme Court in the *Wade v. Hunter* case held in view of the Manual for Court-martial permitting a continuation of an action to obtain the benefit of other witnesses and the tactical situation constituted the "urgent necessity."

In the case at bar there was never any "imperious necessity," no *emergent, urgent or manifestly compelling reason* for discharging the first jury, nor as said in Wharton's Criminal Law, *supra*, or by the yardstick laid down in the *Perez* case (approved in the *Wade* case) there was no consent of Ormont, no illness of a juror, of the prisoner, of the court, absence of a juryman (as existed in the *Potash* case), no impossibility of the jurors agreeing on a verdict, no untoward accident that rendered a verdict impossible, no extreme and overwhelming physical or legal necessity (as existed in the *Wade* case), nor as said in the *Potash* case, nor did a situation exist that came within the pronouncement of the *Perez* case, "* * * the power ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes; * * *"

No such impelling circumstances existed, nor did any plain nor obvious causes exist. So far as appellant Ormont is concerned, and he is the only one concerned on this point, he did not, nor did his counsel at any time, intimate that he was dissatisfied with the jury or felt that he had suffered the slightest prejudice by the reference by the prosecuting attorney to another case, which reference the prosecutor probably had a legal right to make—made no motion, suggestion, or intimation to the court that said jury should be discharged—neither did the prosecuting attorney make such suggestion, intimation, or motion—the jury had been carefully selected before it was passed

and accepted by appellant Ormont's counsel, and appellant was content therewith and after the jury was duly sworn he had a vested right to be tried by that jury of which right he could not be divested in the absence of the existence of one or more causes laid down in Wharton's Criminal Law, *supra*, yet the trial court did violate appellant's right to be tried by said jury without any "imperious necessity."

So far as appellant Ormont was concerned, the trial judge was never, in any manner, called upon to exercise any discretion and without having the question presented to him by appellant Ormont in some form calling for the exercise of discretion he had no right to pretend to exercise discretion so far as this appellant is concerned. The fact that Judge Hall was called upon by Mr. Himmel-farb's counsel to pass upon the matter did not justify the trial court in depriving appellant Ormont of his vested right to be tried by the first jury.

This court has properly held in line with the impelling authorities that appellant Ormont had a vested right to the first jury that was sworn to try him—that the swearing of the jury constituted "jeopardy" (*Cornero v. United States*, 9th, 48 F. 2d 69, 73)—that his counsel could not without express authority waive such right and did not do so—and that silence was not consent to the discharge of the jury.

Using the *Perez* case as a yardstick to determine whether or not double jeopardy exists while there is no question about the fact that the trial court must exercise a certain amount of discretion and must be given certain discretion, but to extend the *Perez* case now to hold that trial court has a right to exercise its discretion to discharge a jury at any time it sees fit is to extend the rule to the

point where the yardstick laid down in the *Perez* case is meaningless and permits the court to take away a given constitutional right of a defendant and comes in the pervue of the remark made by Justice Murphy in the *Wade* case wherein he stated:

“The guarantee of the constitution against double jeopardy is not to be eroded away by a tide of plausible appearing exceptions.”

and would lead us to the point where we are no longer a government of laws, but a government of men.

Therefore, we urgently petition this court for a rehearing and reconsideration of said case and particularly of said point and for the following points hereinafter raised as we sincerely believe that appellant Ormont was twice placed in jeopardy and that on a reconsideration this Honorable Court will so determine.

II.

Privileged Communication.

Government witness Malin was a Certified Public Accountant [R. Vol. III, p. 1091] and, therefore, the appellant requests that the court reconsider its ruling with respect that “privileged communication are not recognized as between a client and his accountant” where the lawyer hires the C. P. A. for the reason that the Tax Court and Treasury Department recognize a Certified Public Accountant as one who can qualify to practice under their rules (see Rule 2 “b” United States Code Annotated, Title 26 I. R. C., Sec. 3200 to end, pp. 603) and further recognize that an accountant practicing before them has the same privileges as a lawyer including privileged communication. (Wigmore on Evidence, Vol. VIII, Section 2300

“a” Internal Revenue Bulletin, Vol. XV-2, July-December, 1936, p. 341.)

Regulations for the recognition of agents and attorneys, made by the Secretary of the Treasury, under authority of Statute 1884, July 7, U. S. Code, Title 5, Section 261; Section 2, paragraph e:

“An agent enrolled . . . shall have the same rights, powers, and privileges and be subject to the same duties as an enrolled attorney, . . .”

with certain limitations.

In this day of filing income tax returns that requires the aid of an accountant, to hold that no privilege exists between a C. P. A. and a client *wherein a lawyer hires a C. P. A. to help him*, is to overlook the fact that the C. P. A. is as much or more of a necessity than a secretary in the conduct of tax work and to hold that a client loses his privilege because of the presence of a C. P. A. on the theory that the third person is not indispensable in order for the communication to be made to the attorney, we must reach a very strained and erroneously strange conclusion, because it is common knowledge of which this court cannot only take judicial notice, but would have to close its eyes to the existing facts if it came to the conclusion that most lawyers know more about tax matters than most C. P. A.'s, and is contrary to the views expressed by Mr. Wigmore who was considered one of the foremost authorities on the subject of evidence.¹

¹Section 2311, Volume 8, page 602, 3rd Edition, Wigmore on Evidence. One of the circumstances, by which it is commonly apparent that the communication is not confidential is the presence of a third person, *not being the agent of either client or attorney*. (Italics ours.) Wigmore stresses the waiver by the presence of a person (other than the agent of either).

If the ruling that privileged communications are not recognized as between a client and his accountant where the lawyer hires the C. P. A. is permitted to stand unchanged, the court will have established a very dangerous precedent that surely will plague it in the future because to permit the rule to stand would make every C. P. A. an involuntary "stool pigeon" for the government involving the millions of persons who have heretofore relied on government regulations that the privilege extended to the client when he retained the C. P. A.

III.

Violation of the Constitutional Amendment V in Attempting Before the Jury to Compel the Defendant to Produce His Books.

Specification of Error 52 is referred to in court's opinion as 42. See pages 26, 27, and 28 of opinion. The court agrees with appellant Ormont that it is error to request a defendant in a criminal case in the presence of a jury to testify or produce documents against his will, although he makes no objection, but then it reaches the conclusion that it was not prejudicial because there is "no showing that the jurors knew of the service and, too, that most likely they didn't; the court immediately quashed subpoena." For the court to reach the conclusion that there was "no showing that the jurors knew of the service and, too, that most likely they didn't" is contrary to law in that a presumption exists that one who looks sees, or a person is presumed to see that which he could see by looking. *Awtio v. Miller*, 92 Mont. 150, 11 P. 2d 1039; *Horton v. Atcheson, Topeka, Santa Fe Ry.*, 161 Kans. 403, 168 P. 2d 928; *Bleirer v. Wolf*, 23 Wash. 2d 368, 161 P. 2d 145; *Calvert v. City of Seattle*, 23 Wash. 2d 817, 162 P. 2d 441; *O'Brien v. Schellberg*, 59 A. C. A. 933, 939,

140 P. 2d 159, 162; *Collier v. Los Angeles Ry. Co.*, 60 A. C. A. 221, 140 P. 2d 206. "This presumption is itself a species of evidence, and it shall prevail and control . . . unless it is overcome by satisfactory evidence . . .," citing from *Westberg v. Wilde* (1939), 14 Cal. 2d 360, 94 P. 2d 590. We wish to further call the attention of the court that the deputy marshal was in uniform, had a United States marshal badge in plain view and came right in front view of the jurors and handed appellant Ormont the subpoena. Certainly the motion to quash was granted, *but the hearing on the motion was outside the presence of the jury* and in that connection it respectfully submitted that the court *did not instruct the jury to disregard the activity of the United States attorney.* (Italics ours.) [R. Vol. II, pp. 805 to 809.] This Honorable Court is under the erroneous impression that the trial court directed the jury to disregard the error because it cited *McDonough v. United States*, 9th, 299 Fed. 30, 42, in which case this court attempted to distinguish the *McKnight* case from the *Ormont* case where a demand for producing incriminating documents was made by government counsel, just as in the *Ormont* case, by the direction of the trial judge, *but in the Ormont case no direction was made to the jury to disregard the error.* (Italics ours.) In the *McDonough* case, the case of *McKnight v. United States*, 115 Fed. 972, 976, is again distinguished:

"The situation was, in fact, very different. In the trial court in that case a demand was made by counsel for the government, acting by direction of the trial judge upon the defendant to produce an incriminating document. This was plainly error, *but there was no order to the court directing the jury to disregard the error.* Had there been such an or-

der as there was in this case, the inference is that the Circuit Court of Appeals would have held that the error was cured.” (*McDonald v. United States*, 299 Fed. 42. See footnote of pages 27 and 28 of court’s opinion.) (Italics ours.)

Even in the case of *United States v. Rosenstein*, 2nd, 34 F. 2d 630, 634, the court stated:

“The court instructed the jury to disregard this request (to defendant to furnish a check as evidence against himself), stating that the appellant was not called upon to produce papers in his possession to be used against himself.”

If it was improper to ask for the production of checks, that error was cured by the caution given to the jury. NO SUCH CAUTIONARY INSTRUCTION WAS GIVEN FOR APPELLANT ORMONT. (Italics ours.)

The case cited by the court of *Fitter v. United States*, 2nd, 258 Fed. 567, 576, is readily distinguishable, for the court there instructed the jurors if they heard the improper remark of the prosecutor to disregard it, and the error was therefore harmless. Moreover, it is to be noted that in *Bain v. United States*, 6th, 262 Fed. 664, 667, in the footnote on page 27 of the opinion:

“The trial court did everything possible to neutralize the false step which had been made.”

To make matters worse in the Ormont case, the United States attorney thereafter argued that the books were in evidence even though the books were never in evidence. (Italics ours.) It is, therefore, respectfully submitted that appellant Ormont’s constitutional right was breached and

that to not recognize that the plain error was not corrected and therefore prejudicial is to:

“Condone a dangerous laxity on the part of the trial court in the discharging of its duty to protect the fundamental rights of the accused.” (*Glasser v. United States*, 315 U. S. 60, 72 and further to quote from *Cornero v. United States*, 9th, 48 F. 2d 69.)

In the *Cornero* case with respect to the plea of former jeopardy, the court said:

“We are here dealing, however, with a fundamental right of a person accused of crime, guaranteed to him by the Constitution, and such right cannot be frittered away or abridged by general rules concerning the importance of advancing public justice.”

“The guarantee of the Constitution . . . is not to be eroded away by a tide of plausible-appearing exceptions.” (*Wade v. Hunter*, 336 U. S. 684 at 694, dissenting opinion.)

Attention is further directed to this Honorable Court’s opinion, pages 4 and 5, wherein the court cited in its footnote *Brady v. United States*, 8th, that a strong presumption is raised against the waiver of fundamental rights by an accused, and then continues that the accused constitutional rights are jealously and vigilantly guarded, citing *Johnston v. Zerbst*, 304 U. S. 458, 464; *Glasser v. United States*, 315 U. S. 60, 70; *Von Moltke v. Gillies*, 332 U. S. 708, 723; *McCrea v. Jackson*, 6th, 148 F. 2d 193, 197.

Wherefore, it is respectfully submitted that using the Supreme Court’s standards of protecting the constitutional right of a defendant, the court by failing to caution the jury to disregard the activity of the prosecuting attorney,

or otherwise instruct the jury with respect thereto deprived the defendant of a fundamental constitutional right, and as said in the case of *Gillespie v. State*, 5 Okla. Crim. 546, 115 Pac. 620 (Ann. Case, 1912, p. 259):

“When such a demand is made, a defendant must accept the alternative of either producing the letters, and thereby incriminating himself, or of having the jury place the strongest possible construction against him upon his failure to do so. If this can be done, the very life, body, and soul of the Constitution would be violated and trampled upon.”

IV.

Prejudicial Argument of District Attorney.

This Honorable Court concedes that some of the action of the United States attorney are subject to criticism, but then states that they are not such as to require a reversal of the judgment. We pray that the court re-examine the conduct of the United States attorney. The United States attorney argued:

“And supposing he had the cash? Let’s assume he had the cash. What did he do with it? Well, in 1943 (*italics ours*) (defendant Ormont was acquitted by the court prior to the argument for the year 1943) out of the \$12,000 he bought about \$8000 worth of bonds. You remember that testimony, \$8000 worth of bonds. That I assume is intended to show, or at least you are supposed to draw the inference [R. Vol. IV, p. 1476] from that, that the unreported income which Mr. Eustice claims this man accumulated during that year because he bought \$8000 worth of bonds.

Take the \$8000 and then look at this Schedule No. 42 which shows how many bonds were actually

bought during that year and see if you don't find over \$50,000 worth of bonds bought that year—\$50,000 worth of bonds—some such sum. Just look at them. They are enumerated on the Schedule and it is in evidence.

What is \$8000 off of that? It is \$42,000. Well, let's assume he had \$8000 in cash. Does that change the story or the picture that was presented here by Mr. Eustice from these records? I submit to you that it doesn't change it a single iota, not a single iota. Any explanation as to the other money that was used to buy the bonds? No, except some checks were shown here. Which of the bonds were bought with those checks? I can't say. I don't know." [R. Vol. IV, pp. 1476, 1477.]

This argument could not have been anything but prejudicial, as the evidence was contrary to the facts submitted by the government witnesses, was false, and could have only confused the jury, because it left the jury with the impression that appellant Ormont did not account for \$42,000 in government bonds and being as he was tried only for the year 1944, the argument misled the jury to believe the government charge that the defendant filed a false return, showing a gross taxable income of \$35,982.52.

Counsel stated that because Mr. Ormont told Mr. Link to change some figures on the books that that was falsifying the records. [R. Vol. IV, p. 1462.] To demonstrate to this court the viciousness and prejudice of that argument of the United States attorney this Honorable Court has followed the false argument of Mr. Strong, the United States attorney, for in its footnote on page 14 of its opinion the court stated:

"* * * Ormont had instructed him (Mr. Link) to make erroneous entries and to change calculations

in order not to lose certain government subsidies, which Link did. * * *”

See Record, Volume II, page 504, where the following transpired:

“Mr. Link: He told me that those were checks in payment of differences and changes which he had asked me to make, and which he made on the original bills in order to avoid the loss of the subsidy payments. That those were payments which he wanted to appear on the books as being made to offset the loss of subsidy payments.

Mr. Robnett: I move to strike the answer out upon the ground that it does not prove or disprove anything in this indictment.

Mr. Strong: It proves that the records are false.

The Court: Government counsel’s statement to the jury (256) will be disregarded by the jury.

Mr. Strong: I was not talking to the jury.

The Court: You are speaking in the presence of the jury, counsel.”

This testimony was with respect to the year 1943 for which year the defendant Ormont was acquitted and wherein we quote from Record, Volume II, pages 471 to 472 as follows:

“The Court: That was a recorded increase in the amount of money paid for the purchase of cattle?

The Witness (Mr. Link): That is right.”

On page 472, in speaking of adding the items on the books as additional cost, the witness said of Mr. Ormont as follows:

“A. He made a check out for it.

The Court: *He did what?* (Italics ours.)

The Witness: He made the check out for that increased amount.

The Court: He actually paid the additional money?

The Witness: He paid the additional money with a check which was drawn.

The Court: He paid the additional \$3000?

The Witness: Yes.

The Court: So that the books were accurate when it said that he spent \$3000 more?"

Checks were thereafter introduced showing the payment of the exact amounts. [See R. Vol. II, pp. 486-7, and Appellant Ormont's Reply Brief pp. 11 and 12.] How can it be argued that the instruction by Ormont to increase an amount which were actually paid constitute a falsification of Ormont's records. To now hold after the defendant was acquitted for 1943 and after the government's own witness, Link, previously testified to the question that the return for 1943 was false to the extent of \$3000 and \$3000 only is to [see R. Vol. II, p. 471] come to a conclusion that under no circumstances can a businessman request an accountant to change his records even though those changes are necessary to reflect the true circumstances of a transaction for fear that at some later time someone might draw an inference that the change or that the request for the change of the record might constitute a falsification and would therefor set a standard of keeping books that would be tantamount to require an individual to never make a mistake or in other words maintain a standard of perfection.

Mr. Strong, the United States attorney, argued on Record, Volume IV, page 1559:

" . . . The books speak for themselves. That is why they were admitted in evidence. If they weren't in evidence they wouldn't be in this case."

Not only was this statement false because the books were never admitted into evidence, but gives added emphasis to the objection by appellant Ormont to being served with a *subpoena duces tecum* in the presence of the jury during the process of the trial wherein the court subsequently granted the appellant Ormont his motion to quash, *but did not in any other manner instruct the jury to disregard the activity of the United States attorney.* (Italics ours.)

In *Pierce v. United States* (86 F. 2d 949), the court said:

“Of more serious import is the complaint that the trial was not fairly conducted, and that conviction was had otherwise than in accordance with the law and the evidence, for: ‘A trial in court is never . . . purely a private controversy . . . of no importance to the public.’ The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence.”

New York Central R. R. Co. v. Johnson, 279 U. S. 310, 318, 49 S. Ct. 300, 303, 73 L. Ed. 706.

* * * * *

“Sometimes a single misstep on the part of the prosecutor may be so destructive of the right of a defendant to a fair trial that reversal must follow, as in *Pharr v. United States*, 48 F. 2d 767 (CCA 6). At other times transgressions may be so slight that if promptly corrected and their repetition avoided the court may not say that the jury was prejudiced,

though often the mere cumulative effect of a course of improper conduct compels reversal.”

Volkmar v. United States, 13 F. 2d 594 (C. C. A. 6);

Frantz v. United States, 62 F. 2d 737 (C. C. A. 6).

* * * * *

“It is quite true that the court ruled correctly upon all objections interposed by the defendants, but in most instances the ruling came after the mischief had been done, and it was clearly a case where the misconduct of the prosecutors was neither slight nor confined to a single instance, but so pronounced and persistent that the cumulative effect upon the jury cannot be disregarded as inconsequential. *Berger v. United States* 295 U. S. 78, 89, 55 S. Ct. 629, 632, 79 L. ed. 1314. As was said in the case: ‘The trial judge, it is true, sustained objections to some of the questions, insinuations and misstatements, and instructed the jury to disregard them. *But the situation was one which called for stern rebuke and repressive measures and, perhaps, if these were not successful, for the granting of a mistrial. It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken.*’” (Italics ours.)

* * * * *

“The point was made below that the improper conduct of the prosecuting attorney was waived by failure of the defendants to move for a mistrial, and reliance is placed upon *Chadwick v. United States*, 141 F. 225 (CCA 6); *Sparks v. United States*, 241 F. 777 (CCA 6); *Carter v. Tennessee*, 18 F. 2d 865 (CCA 6); and *Dunlop v. United States*, 165 U. S.

487, 17 S. Ct. 375, 41 L. ed. 799. We are not here so much concerned with improper argument springing from the heat and enthusiasm of advocacy, as we are with what appears to have been a studied effort to inject into the case irrelevant and prejudicial matter for the purpose of influencing the verdict, and its continued repetition after adverse rulings. Indulgence was designed rather than inadvertent, and an improper purpose its only explanation. That it was intended to prejudice the jury is sufficient ground for a conclusion that in fact it did so. Similar latitude in respect to irrelevant matter permitted to counsel for the defendants neither vindicates nor palliates the license assumed by the prosecutors, nor lessens its destructive effect upon the fairness of the trial. Above and beyond all technical procedural rules, designed to preserve the rights of litigants, is the public interest in the maintenance of the nation's courts as fair and impartial forums where neither bias nor prejudice rules, and appeals to passion find no place, though the government itself be there a litigant. 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.' *Berger v. United States, supra*. 'Public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice.' *N. Y. Central R. Co. v. Johnson, supra*, 279 U. S. 310, 318, 49 S. Ct. 300, 73 L.

ed. 706. Where such paramount considerations are involved, procedural niceties will not preclude a court from correcting error.”

And in *Kassing v. United States* (87 F. 2d 183), the court deemed the following argument of the United States attorney improper and unsound in law and fact:

“The Government of the United States is trying to convict this man, and on this undisputed evidence we are entitled to have twelve reasonable men believe he was a member of this gang and if it was the act of one it was the act of all. If he had any legitimate business down here, gentlemen, God knows we are entitled to have him explain to you twelve men here . . . not him—but by other witnesses.”

To the same effect:

United States v. Perlstein (120 F. 2d 276);

Weathers v. United States (117 F. 2d 585);

Ippolito v. United States (108 F. 2d 668).

Taking into consideration the misstatements of government's counsel together with the admitted error of serving the defendant with a *subpoena duces tecum* in the presence of the jury and during the course of the trial together with the other misstatements by government counsel as set forth in appellant's opening brief, can it be argued that the remarks and conduct of the government counsel was anything but prejudicial in view of the fact that this was a case involving money, and it is respectfully submitted that the case of *Berger v. United States*, 295 U. S. 78, is in point.

V.

Alleged Admission Given Upon Promise of Confidence.

The court on page 19 of its opinion states that there is no proof that a promise of confidence was made nor proof of any promise permitting adjustment of discrepancies. The appellant wishes to direct its attention to [R. Vol. III, p. 1172] page 120 of appellant's opening brief:

"Mr. Robnett: Q. And at that time Mr. Ormont, before making any statement of anything else asked you, did he not, whether or not anything he might say there would be kept in confidence by you and those present, or words to that effect?

Mr. Bircher: A. Yes, he asked something of that kind."

In view of the United States Treasury Department circular to refrain from criminal prosecutions where the taxpayer makes voluntary disclosures (see *United States v. Lustig*, 67 Fed. Supp. 306), to now hold that his attorney (Mirman) misadvised him and that the circular issued by the Treasury Department is not recognizable by the courts is to encourage lawyers to advise their clients not to talk, and not to cooperate with the Internal Revenue Department and to prevent fulfillment of effecting the purpose of the circular, namely, to secure the revenue to which the government is justly entitled and so greatly in need. The record is replete that the appellant did cooperate with the government by giving it his books, etc., after having asked that the information be kept in confidence.

VI.

Variance.

The appellant requests that this Honorable Court reconsider the appellant Ormont's Specification of Error 7. This Honorable Court's holding therein, it is respectfully submitted, is in conflict with its very recent case of *Corney v. United States*, 163 F. 2d 784. (See pp. 17 to 20 of appellant Ormont's reply brief.)

VII.

Residence of Defendant Ormont.

Appellant finds no argument with the law as laid down by this Honorable Court, but agrees with its citation of *Tinkoff v. United States*, 7th, 86 F. 2d 868, 876, where it is said that:

" . . . When he is charged with wilful effort to defeat the tax by presenting a false return no *allegation* of duty upon the part of appellant is necessary." (Italics ours.)

In so far as the indictment is concerned the indictment properly alleged:

"That on or about the 15th day of March, 1945, in the Southern District of California and within the jurisdiction of this court, etc. . . ."

It is respectfully submitted that this matter does not involve a question of allegation but a matter of failure to prove. The plaintiff must establish venue. The case of *Tinkoff v. United States*, 7th, 86 F. 2d 876, said:

" . . . no allegation of duty upon the part of appellant is necessary . . ."

can be only construed with the court's previous sentence if no return were made,

“ . . . it might have been reasonably necessary to allege and show a duty in that respect upon his part”

and has no bearing whatsoever on the question of venue.

“Under this constitutional provision, Sixth Amendment, the venue is as material as any other allegation in the indictment and the burden to prove it rests upon the government,”

citing *Vernon v. United States*, 146 Fed. 121, 126. (*Moran v. U. S.*, 264 Fed. 768, 770.) Failure to call attention to the government's lack of proof of venue at the trial does not waive the error and judgment will be reversed therefor. (*Brightman v. United States*, 7 F. 2d 532.) It is further respectfully submitted that the question of venue was not the question presented in the *Tinkoff* case.

VIII.

Other Similar Offenses.

The appellant Ormont urges that this Honorable Court reconsider its view as to Errors 50 and 51 (see pp. 21 and 22 of opinion) for the reason that none of the cases cited by the court had the defendant been acquitted of all the other counts and, therefore, the cases cited by the court are clearly distinguishable,¹ for the reason that leav-

¹In *Allis v. U. S.*, 155 U. S. 117, 15 Supreme Court 36, 39 L. Ed. 91, evidence was admitted for the purpose of showing motive and intent in the plan followed; the defendant there went on trial *on all counts*. (Italics ours.) Likewise *Tinkoff v. U. S.*, 7th, 86 F. 2d 866, 879. In the case of *Chattock v. U. S.*, 77 F. 2d 961, cert. den. 296 U. S. 609, there was no acquittal on any of the counts for the defendant. In the case of *Emmich v. U. S.*, 6th, 298 Fed. 5, cert. den. 266 U. S. 608, the defendant there admitted an adjustment or liability for the previous year and the defendant was not acquitted or tried for any prior years. In the case of *Rose v. U. S.*, 10th, 128 F. 2d 622, 625, the defendant there was found guilty on each count; likewise in the case of *Malone v. U. S.*, 7th, 94 F. 2d 281.

ing all that evidence in could only go to show *lack of intent* as expressed by the trial court (italics ours):

“The Court: I thought that it benefited the defendants leaving it in . . .” [R. Vol. IV, p. 1610.]

and leaving all that mass of evidence could and did have only the effect of confusing the jury as stated in the case of *People v. Albertson*, 23 Cal. 2d 580, 581, and moreover the court’s finding the defendant “not guilty” on the evidence for 1942 and 1943 the issue of wilfulness or intent became *res judicata* for the years 1942 and 1943 and for that reason said evidence should not have been used for the year 1944.

IX.

Confusing Instructions.

This Honorable Court concedes that Specifications of Errors 74 and 76 was well taken in that the court erred in instructing the jury as follows:

“In the event that you find that either defendant as to the particular count failed to report his true income in the amount substantially as claimed by the Government for the calendar year 1944, then as matter of law the tax for the calendar year 1944 would have been substantially more than paid by such defendant for the calendar year 1944.” [R. Vol. IV, p. 1578.]

And:

“The Internal Revenue regulations, which have the force of law, provide that the type of books *and* records which must be kept in this connection to allow the filing of a return on a fiscal year basis, are books *and* records which contain entries which

are sufficient to establish the amount of gross income and the deductions, credits, and other matters required to be shown in returns, and that such books *and* records shall be kept at all times available for inspection by Internal Revenue officers and shall be retained so long as the contents may become material in the administration of any internal revenue law.

“If no books or records of the type required by law are kept, a fiscal year return cannot be filed, but the sums earned must be reported upon the calendar year return for the year in which they were earned.” (*Italics supplied.*) [R. Vol. IV, p. 1583.]

and then concludes that the jury was sufficiently instructed and could not have been misled by the instructions complained of. It is conceded that the law in the Federal Courts with respect to instructing the jury that the court will consider the instructions as a whole, but it is argued by the appellant Ormont that the law with respect to instructions is that:

“Where the instructions on a material point are contradictory, it is impossible for the jury to decide which should prevail, and it is equally impossible, after the verdict, to know that the jury was not influenced by that instruction, which was erroneous, as one or the other must necessarily be . . .” (*Haight et al. v. Vallet et al.*, 26 Pac. 897, at 898.)

That it is a sufficient ground for reversing a judgment has frequently been held. (*Haight et al. v. Vallet et al.*, 26 Pac. 897, at 898; *Guthery v. Carney*, 124 Pac. 1045, at 1050; *Nicola v. United States*, 72 F. 2d 780.)

There might be merit in the court's argument that the jury was not misled by the confusing instructions, except

for the fact that the United States attorney argued as to instruction 74 in particular that all that was necessary to convict the defendant Ormont was for the government to prove a substantial amount, and said that \$11,000 was enough and is different and contradictory from the instruction which the court subsequently gave, and which said instruction this Honorable Court said cured the previously erroneous instruction, and as said in the case of *People v. Valencia*, 43 Cal. 552, where conflicting and contradictory instructions were given, the Supreme Court held that they could not disregard such conflict, and determined that there was error, even though the court had said that the jury ought to have found the defendant guilty.

Wherefore, appellant prays that his petition for rehearing be granted.

Respectfully submitted,

DALY B. ROBNETT and

BENJAMIN F. KOSDON,

By DALY B. ROBNETT,

Attorneys for Appellant.

We hereby certify that this petition is made in good faith, and not for the purpose of delay.

DALY B. ROBNETT,

BENJAMIN F. KOSDON.

No. 12,061

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TOMOYA KAWAKITA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the District Court of the United States for the
Southern District of California Central Division.
Honorable William C. Mathes, Trial Judge.

Opening Brief on Behalf of Tomoya Kawakita From
the Judgment and Sentence of Death.

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MAY 31 1950

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No. 12,061

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TOMOYA KAWAKITA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the District Court of the United States for the
Southern District of California Central Division.

Honorable William C. Mathes, Trial Judge.

Opening Brief on Behalf of Tomoya Kawakita From
the Judgment and Sentence of Death.

Statement.

This is an appeal from the judgment and sentence of death of Tomoya Kawakita, a dual citizen of both Japan and the United States from birth, allegedly for Treason, while a resident of Japan, and for alleged acts in a prisoner of war camp in Japan in connection with the disarmed labor battallion held by the then Japanese nation pursuant to international agreement. It was conceded by the government that Kawakita was a citizen of Japan at all times.

Jurisdiction.

Jurisdiction is conferred by the Constitution of the United States, Article III, Section 3, by Title 18, subdivision 1, U. S. Code (1946 Edition), and by Title 1254, subdivision 1, Title 28, New Federal Judiciary Code.

The judgment was pronounced by the District Court of the United States, Southern District of California, Central Division, by the Honorable William C. Mathes, Judge presiding, on October 5, 1948.

Notice of appeal was duly and regularly taken to the United States Court of Appeals for the Ninth Circuit [October 5, 1948, Clk. Tr. p. 454], and time has been enlarged by various orders of this court.

Constitutional Provisions, Statutes and Regulations Involved.

These, because of their length, are in the appendix. They are:

Article III, Section 3, U. S. Constitution.

Title 18, subdivision 1 (1946 Edition), U. S. Code.

Sections 800 to 808 of Nationality Code.

Constitutional provision regarding the Law of Nations—International Law and treaties being a part of the Supreme Law of the land.

The section of the Immigration Code regarding the presumption of expatriation.

Certain regulations in the treaties regarding prisoners of war.

State Department Regulations regarding dual citizenship.

Immigration Regulation 315.9.

Summary of the Facts.

Tomoya Kawakita, who was born in the United States of Japanese born parents, citizens of Japan, and who was therefore claimed by Japan as a citizen of that country from the date of his birth, appeals from a judgment of death, which judgment was imposed by the judge following a verdict returned by a jury after eight long, hot and tiring days of deliberation, four of which were enforced by the court with a mandate that it was *their duty to agree* after the jury had reported it had considered every phase of the case and that it was hopelessly deadlocked and twice requested to be discharged and after it had become evident that bitter and acrimonious feeling and fear, fatal to the calm, deliberate and fair consideration which the law contemplates had thoroughly permeated the jury. The jury members had also separated while in the custody of the marshals. Doctors had attended jurors for illness during their deliberations without the knowledge of the defendant or his counsel, or without their consent or approval.

Numerous war veterans suffering from the psychosis of battle, bitter at the enemy that had made them captive slaves, were paraded before the jury to tell their alleged experiences at Camp Oeyama. They were all, again, heroes for a day, on the witness stand. They repeated tales of their war imprisonment and suffering which, we sincerely regret, deeply affected—and infected—many of the jurors and finally led to the conquest of one more “Jap” under the guise of a “treason” prosecution and conviction.

That these witnesses also deeply affected the learned and brilliant trial judge is shown by the fact that he compelled the jury to deliberate under the circumstances above related and expressed bitterness toward the defendant at the

time of sentence as is evidenced by his remarks, which were embodied in the record at the time of sentence and in which he criticized by necessary implication the executive and judicial clemency which had been afforded in all other cases involving the same charge, and the discretionary punishment which the Congress has permitted in this type of case.¹

Kawakita went to Japan while still a minor—17—and the petty acts alleged to constitute the treason assertedly occurred, if they occurred at all, while he was drafted by the Government of Japan to act as an interpreter in a prisoner of war camp under the Japanese military authorities in Japan, while that country was able to enforce its sovereignty over him and its demand that he render it the allegiance which it claimed was due from him as a citizen of that country and while he was presumptively expatriated from the United States. The record, as will be hereinafter more specifically pointed out, discloses the reception of much evidence which we believe inflamed the passions and excited the resentment of some of the jurors and which could not constitute either intent to betray or giving “aid and comfort to the enemy,” under any reasonable definitions of those terms.

Under the facts of this case, in its setting in a prisoner of war camp in Japan, then having complete sovereignty of its own and acting under international treaty regarding prisoners of war, Kawakita was not, and could not, be guilty of the high crime of treason.

¹The trial court said in effect that the only worth-while use for the life of a traitor is to execute him to set an example to others [R. 5856]. Under this expression every man in the Continental Congress from Washington on down should have been executed. See footnote 18, *Cramer v. U. S.*, 325 U. S. 14.

Eight overt acts were found by the jury. All of them related to prisoners of war under the control of Japanese military while Japan was still a nation. One was for allegedly kicking a prisoner of war to cause him to exert himself when he admittedly was doing nothing at the time; another was for failing to carry a second bucket of paint, the required quota, which this prisoner was not carrying; a third was for failing to return a prisoner of war back to camp for five hours after injury, although no trains were shown to be available. The other five acts were punishment acts carried out by military officers as punishment for the burglary, theft and destruction of government property.

Detailed Summary of Facts.

Tomoya Kawakita was born on September 26, 1921, at Calexico, California, United States of America. [R. 4037.] His father and his mother were each born in Japan and were at all times therefore subjects of Japan and were Issei and not eligible to become citizens of the United States, and at all times the parents were citizens of Japan. [R. 3986.]

Under the Fourteenth Amendment to the Constitution of the United States, Kawakita became a citizen of the United States at the time of and by reason of his birth in the United States, and remained such as long as he was *subject to the jurisdiction thereof*. By the Nationality Act of 1940 he was presumptively expatriated by statute after six months' residence in Japan.

Under the laws of Japan, he became a citizen of Japan by reason of the birth and citizenship of his parents in Japan and was a citizen of Japan at all times mentioned in the indictment.

He was therefore a dual citizen. Under American decisions and under regulations of the American State Department he owed his paramount allegiance to the country in which he was residing. (Passport Laws, Code 1.6; Federal Regulations July 30, 1937; May 19, 1941.) By the Nationality Act of 1940 he was presumptively expatriated from the United States. (See appendix.)

The Government of the United States, at the time of his birth, and at all times mentioned herein, recognized *dual-citizenship* and the necessary consequences of such dual-citizenship. (See *Perkins, Secretary of Labor, v. Elg*, 307 U. S. 325-50, *Savorgnan v. United States*, 94 L. Ed. (Adv.) 203, and also Defendant's Exhibit DP, State Department Bulletin, Sec. 20.) It recognized the paramount allegiance of a dual citizen to the country where he is residing, if a citizen of that country also.

Kawakita's father was Yasaburo Kawakita, who maintained a grocery store in Calexico, California. [Rep. Tr. 3986-7.]

At the age of seventeen Tomoya Kawakita made a trip to Japan with his father and obtained an American passport at that time. [Exhibit 12A; R. 4040.]

Kawakita's father sent him to elementary school and to high school in Calexico, California. There he attended Hoffman School and Rockwood Junior High School and Union High School [R. 53], where he was graduated. At the time of his graduation, he was doing Boy Scout work, he was helping his father in his grocery store, and he participated in the solicitation of American Red Cross funds.

In 1939, his father was requested by his grandfather, then residing in Japan, to bring his grandson over to

Japan as he would like to see the grandson before he passed away. The grandfather was then 83 years old. [R. 3989.]

Tomoya Kawakita received an American passport and went to Japan on that passport, in 1939. The passport was good for two years, or to 1941. It was renewed to 1942, and it then expired. There was no passport during any of the times covered by the indictment. The war also suspended any protection which this government gave to any of its citizens in Japan. The Nationality Act of 1940 suspended the duty of allegiance to the United States by reason of Kawakita's continued residence in Japan and his obligation of loyalty to Japan. This loyalty has to be 100% loyalty while residing there. It also suspended his right to call on the United States for protection unless and until he overcame the presumption of expatriation. That overcoming of the presumption of expatriation was and is only as of the date when overcome.

While in Japan, Kawakita was persuaded to go to school the Meiji University in Japan in preparation of commerce between the United States and Japan in the export and import field. His father left his son in Japan for educational purposes and returned to the United States.

The father provided \$25.00 per month to him during this time to maintain him, and in payment of his education. [R. 3992.] Kawakita attended preliminary school at the Nichi-Bei Home where he studied the Japanese language and took the entrance examination for the University.

Kawakita renewed his passport, which renewal was to December, 1942, at which time the passport expired. [Exhibits 2a, b, c; R. 4162-4.]

In the meantime, war broke out on December 7, 1941. Kawakita remained at the University while many of his fellow students and classmates were entering the Military Service of Japan and going to war against the United States.

Kawakita testified that he did not enter the Japanese *army* because he did not want to fight his former classmates who had gone to school with him in Calexico, California. [R. 4047.]* He never did, although he was eligible to, receive a commission in the Japanese army. However, he was drafted by the Japanese government as a Japanese citizen, subject to the draft, to serve in its labor draft. [R. Exhibit Z.]

At that time Kawakita was registered at the University as a foreigner and his address was then given as Calexico, California, and he was registered in accordance with the requirements of *alien* registration at the local police station. [R. 4051; Exhibit CR; R. 3866 *et seq.*]

On about March 2 or 3, 1943 [R. 4051], he was stopped by a Japanese policeman who wanted to know something

*Q. By Mr. Lavine: As a result of that military training what had you earned as a result of it that you received in the University? A. I received my credits in the military training and was entitled to enter an officer training school and was entitled to receive the rank of second lieutenant.

Q. Did you take that opportunity? A. No, sir.

Q. Why didn't you? A. Because I did not want to fight against the United States. I had friends, schoolmates at home whom I have associated with while I was in high school. [R. 4047.]

about his status.* Kawakita told the policeman that he was born in the United States and they told him that he had to make an election whether he was going to be Japanese or American. They told him the way to do that was to have his name entered on the family Koseki. This proceeding is described by Kawakita in detail. [R. 4053.]

He went down to the City Hall of the City of Suzuka, where he made a formal declaration. He had his name entered by the Registrar at the City Hall, at the request of his uncle, Yazaemon Kawakita, in the family Koseki. His uncle went to the Registrar who took care of the family Koseki; his uncle told the Registrar that this is his nephew and he desires to enter his name formally in the family Koseki as a Japanese subject. [R. 4385.] The Registrar asked when he was born and Kawakita told him he was born on September 26, 1921. The Registrar asked him if it was his desire to enter his name in the family Koseki as a Japanese subject and he told him "yes." There were entries made on the Koseki and then Kawakita took the family seal and stamped it on the record. This, according to Japanese law, was a reaffirmation of allegiance to Japan. [Exhibit A.] The Registrar then made three or four copies of the Koseki which Kawakita took to the police station for removal of his name from the alien registration records. Upon presentation of the Koseki to the local police, and leaving it there, his name was removed from the alien registration, and he was allowed to go about Japan as he pleased. [R. 4053.] Japan regarded him as one of its citizens, with paramount duty of loyalty to it.

*This was very similar to the stopping of Americans by police to show their draft card.

Kawakita also took the document to the place where he was going to work, and where he did become employed, to satisfy them that he was a Japanese national. [R. 4386.]

Foreigners could not be hired to work in a defense plant. [R. 4050.] The company was under the control of the army.

As Kawakita was cut off from any money from the United States and from his father, he sought a job with the Nippon Yakin Kaisha Company, of which Saturo Mori was president. [R. 471.] The company had offices in Tokyo and had a nickel mine at Oeyama at Yosa-Gun Kyoto; they employed about 500 men to smelt. The prisoner of war camp was controlled by the Japanese military department and received its orders from it. [R. 3726.] All orders were given by Lt. Hazama. [R. 3727.] In 1943 they expected prisoners of war from Canada and Australia, and for that reason they needed someone who spoke English. [R. 473.] Tomoya Kawakita was hired to act as an interpreter. He had no position of authority. He was assigned to work at Oeyama in Kyoto province. [R. 473.] Mr. Mori knew he could not hire any foreigner. [R. 477, 478.] He at all times believed that Tomoya Kawakita was a Japanese national. Kawakita went to work in the mine and was assigned to interpret between the British and Canadian prisoners of war and the Japanese officials. In the summer of 1944, Kawakita went to China on a *Japanese* passport as a Japanese subject in behalf of bringing back some Chinese to work in another section of the company. [R. 4059.] The work at the camp was supervised and directed by military personnel. Kawakita did not attend the conferences. [R. 3722.]

Stranded in Japan because of the war, cut off from his father's allowance and his grandfather having died, Kawakita received financial help from a friend of his father, named Takeo Miki, until he graduated from college. He then told Mr. Miki he did not want to be a further burden upon him and would like to get a job somewhere. [R. 4048.] He could have gone into the Japanese army, and by reason of his credits in the military training he had received in college he was entitled to receive the rank of second lieutenant. [R. 4047.] He did not take that opportunity "because I did not want to fight against the United States. I had friends, schoolmates at home whom I have associated with while I was in high school." [R. 4047.]

Mr. Takeo Miki told the defendant that the Oeyama Nickel Industrial Co., Ltd., wanted somebody who could speak English and would need him for the service. [R. 4048.] In July of 1943, he was interviewed by Mr. Hayakawa, General Affairs Section of the Oeyama Nickel Industry Co.; Mr. Hayakawa took his personal history and asked him if he had Japanese nationality. He told Mr. Hayakawa, "I have." He told Mr. Hayakawa his name was registered in the family Koseki at Miye Prefecture. [R. 4049.]

Mr. Hayakawa told him that he would need two more interpreters and Kawakita introduced Mr. Meiji Fujisawa and Mr. Inoue to Mr. Hayakawa at the main office in Tokyo. Kawakita had Japanese nationality and Mr. Inoue said that he was in the process of getting Japanese nationality. [R. 4050.]

Mr. Hayakawa sent Mr. Kawakita and Mr. Inoue to Oeyama. He told them that they were to interpret between the prisoners of war and the Japanese military

personnel. "He told us that we were to take orders from the camp authorities, which was the military authority. He told us where we were to live." [R. 4055.]

Prior to that Mr. Takeo Miki, in Tokyo, told Kawakita that the British and Canadians were coming, that the interpretation would be between British and Canadian prisoners of war.

On arriving at the camp the defendant reported to (Military) Lieutenant Hazama, who was camp commandant of the camp. [R. 4056.] Lieutenant Hazama told the defendant and Mr. Inoue that they were to take orders from the military authorities of the camp, and that the place where the prisoners of war were working was a military zone. He said that the defendant was to take orders, to translate or interpret between the company authorities or the military authorities and the prisoners of war. "He told us to act in a stern, military manner and when we interpret between the prisoners of war and the Japanese military authorities in the case there is an order, when the military authorities and the Japanese foremen give orders to the prisoners of war, to interpret it in a firm and clear military voice, just as the Japanese military officer who speak English will give orders to his subordinate." [R. 4056.] He also gave orders that Kawakita should speak nothing, "we should not speak anything about the war, political, and about our personal selves, otherwise it might arouse suspicion and we will be severely punished by the military authorities and even may be killed by the authorities." [R. 4057, 4105.] Lt. Hazama was top man at the camp and directed all military personnel. [R. 3789.]

Meiji Fujisawa was required to become a Japanese National to work in the plant. He received a special permit from the army to work at the company while he was getting Japanese nationality. [R. 4057.] Thereafter he received Japanese Nationality by entering his name in the family register or Koseki. [R. 3594.]* The State Department construed this as expatriation or a loss of American citizenship. The three interpreters then arranged their work between them, alternately, at the mine, the factory and the camp. [R. 4057.] In December, 1943, Kawakita

*On the question of establishing his Japanese citizenship Meiji Fujisawa, another interpreter, testified as follows [Reading from page 3594 of the Record]:

"Well, Mr. Hiyakawa asked me whether I had Japanese citizenship or not and I told him that I did not have any and he told me that the company could not hire any foreign nationals and besides the prisoner of war camp will be under the direct jurisdiction of the army, so the company could not hire any foreign nationals. And he told me that I will have to get a Japanese citizenship before the company can employ me. So I told him I will apply for Japanese citizenship and then he told me for further instructions to report to the Uataki factory in Kyoto."

Then he goes on to tell what happened there; and then I asked him a little later on:

"Well, what did you do thereafter with reference to your Japanese nationality, if anything? A. Well, my name was entered in the Koseki, not in my parents' Koseki but I had to establish a separate Koseki.

Q. You established a separate Koseki? A. Yes, sir.

Q. Were you then married? A. No, sir.

Q. You established a separate Koseki. Will you explain to us what you did? A. Well, I don't know—I can't recall where I went, but I think I went to the metropolitan police station and there I told them in order to work in a Japanese firm as an interpreter I would have to get Japanese citizenship, and that I came to apply.

Q. And what happened then? A. I didn't know until December that I had set up a separate Koseki.

Q. And that was December of— A. 1943." [R. 5170-5172.]

was sent to the mine permanently, and the mine was a distance of about twelve miles from the camp and was arrived at by a special train.

When the defendant first came to Oeyama he moved to the Oeyama area which was the mine dormitory. Later he went to live with Kiyoshi Mori, the mine engineer. [R. 4058.]

In August, 1944, he went to China on a Japanese passport issued at the Miyazu police station in the County of Yoza, on company business. He returned about October 23, 1944. [R. 4059.] After he returned there were two different kinds of prisoners of war in the camp than had been there before. They were Americans as well as British. [R. 4060.] Prior to that time he had ascertained when the second group of prisoners of war came in January, 1944, that there were no American boys in the group. [R. 4060.]

On August 1, 1944, a law went into effect in Japan by which Japanese male population not actually in the army were *drafted* for occupational work. They were served with draft papers and they were compelled to work at the occupation to which they were assigned. They could not quit the occupation, nor transfer from it, without the consent of the government. [R. 488.] It was applicable only to Japanese nationals.

Kawakita, as a Japanese citizen, was served with draft papers upon his return from China in the last part of October, 1944. [Exhibit Z and W.] The company was also drafted by the government and became a government controlled company.

In the meantime, in August of 1944, American prisoners of war arrived at Camp Oeyama.

When Kawakita returned from China and he found that Americans were in the camp, he asked Kiyoshi Mori if he could change his job because he didn't want to interpret any more because there were American prisoners of war at the camp. [R. 4061.] Mori, the mining engineer, told Kawakita that the company is under the control of the government and that the company cannot change positions, or places of work, of their own will, that he was frozen in his job. [R. 4061.]

Kawakita also received the draft papers showing he had been drafted on August 15, 1944, in his absence, to work in this job and that he could not leave it, or fail to work without being severely penalized [Exhibits AB and AB-1 and Z] and that he was like a soldier to the orders of the Japanese government.²

American Sgt. James Montgomery in August, 1944, brought a group of 100 American prisoners of war to the camp from the Philippines. Sgt. Montgomery was placed in charge of American prisoners of war through orders of the Japanese Military Personnel. Sgt. Montgomery was a member of the counter-intelligence corps of the United States [R. 4376]—a fact unknown to the Japanese, who made him one of the bosses of the camp. He had been taken a prisoner of war in the Philippines along

²The setting in which Kawakita found himself—in Japan, in a Japanese Military camp, where only persons of Japanese nationality could be employed; where his employment was checked as to his Japanese nationality, and where everyone about him hated him as a Japanese national and thought he was a Japanese national when in fact he was, as stated in the instructions of the court to the jury, a Japanese citizen (regardless of any claimed American citizenship), we respectfully submit, is not a setting in which the overt acts found by the jury could be construed to be treason.

with many of the others. He described very much in detail the camp, its operations as a military camp, all its vocations and the work. [R. 157 *et seq.*]¹ He described

¹[R. 203]:

Q. When you arrived at Camp Oeyama who did you report to?
A. We were just marched up in front of the headquarters building.

Q. Who marched you up in front of the headquarters building?
A. I marched the men under the supervision of the Japanese guards.

Q. And were those Japanese military guards? A. Well, the guards at this camp were a mixed personnel. Some were soldiers in the Japanese army and others were civilian guards. On that day I do not remember.

Q. And when you got to the camp where you were in charge of these men did they get then assigned to places that they were to sleep and to eat and to live? A. Yes, sir.

Q. During the time they were there? A. Yes.

Q. And you say that occurred about August 5, 1944? A. I believe it was August the 6th.

Q. August the 6th? A. Yes, sir.

Q. In this camp were rules posted in the camp? A. Yes, sir.

Q. Rules and regulations for its conduct, isn't that right?

[R. 204]:

A. Well, everything pertaining to the conduct of the prisoners in the camp were posted there. [Rep. Tr. Vol. III, p. 199, line 21, to p. 204, line 2.]

Q. When you arrived there, the British and Australian prisoners of war were there already, were they not? A. There were, I believe, 263 British prisoners of war at Camp Oeyama at the time I arrived, plus the 100 Americans who had arrived the day before, who had left 24 hours before the group I was with had. [Rep. Tr. Vol. III, p. 204, lines 6 to 11, incl.]

[R. 208]:

Q. When you first arrived there, Sergeant, you stated that a military officer was in charge of the camp and his name was Hazama, is that correct? A. Yes, sir.

Q. And did he remain the commandant of the camp at all times? A. Yes; during my entire stay there.

Q. And the camp was, so far as the prisoners of war were concerned, operated and supervised by the military personnel; isn't that correct?

The Court: Which military personnel?

disciplining prisoners of war by the prisoners themselves. [R. 157 *et seq.*] He also admitted he personally disciplined American prisoners of war for theft by slapping.² [R. 227-29.]

After arrival at the camp, Camp Oeyama, the Americans were assigned to barracks, or "hans." The British and Canadians had a subordinate set up of their own for the government of the camp and the discipline of the men which was run by British Sgt. Harvey, Major Beadnell

A. He was commanding officer of the camp. He was responsible for it.

Mr. Lavine: Lt. Hazama. He was commandant of the camp. [R. 209]:

The Court: I think, when you mention military personnel, you should differentiate so there will be no question. You refer then to the Japanese military personnel?

Mr. Lavine: Yes, sir; the Japanese military personnel.

The Witness: Yes, sir.

²American Sergeant Ralph W. Montgomery (Recalled) testified [R. 227]:

By Mr. Lavine:

"Q. . . . At any time while you were at Oeyama camp did you at any time administer punishment to any prisoner of war?

A. Yes, sir.

Q. What punishments did you administer? A. Well, for stealing I slapped, I think, about three men.

Q. And who were those three men, if you recall? A. One fellow was named Everett; that was his surname; another man's name was Hans; and at the moment I can't call the name of the [R. 228]:
third man.

Q. What had they stolen? A. Hans had stolen about three pair of gloves and, I believe, one or two shirts. And the Japanese, when they issued clothing, they only issued one of each item to each prisoner of war, and when a man reported that items of his clothing had been stolen, why, we searched the kits of the men to determine who had taken them. And in both those instances I found the gloves and shirt in the kit of Hans, and the same thing applied to Everett. I think he had either two or three shirts that were not his property.

of the British forces, British Warrant Officer Tugby, and others. After the men were given about a week's rest, they were assigned to duty in Oeyama mine.

The camp itself was run very much in military fashion and much like a prison in the United States, or a military place of confinement. There was a guardhouse at the entrance. The place was completely fenced in, the guards were on duty and no one could leave the enclosed area except under guard. [R. 236.] There was a guard tower somewhat similar to ours in our own prisons. Prisoners of war wore numbers. [R. 200.]*

It was governed by the Japanese military. [R. 157, 208.] Japanese Lieutenant Hazama was Commandant in charge. The military personnel of Japan operated

*[R. 237] Sgt. Montgomery testified:

Q. Now, was it an offense as far as the Japanese rules or Japanese laws were concerned, for prisoners of war to take these vegetables without permission? A. Yes, we were forbade to.

Q. And if prisoners did take them without permission what was the punishment that was meted out to them? A. If they were caught in the act by the Japanese, why, they were beaten; but if it [R. 238]:

was determined by means of investigation who they were, why, it was usually—they were usually given their punishment by—under the auspices of Major Beadnell, Dr. Bleich, Lieutenant Bryant, and the Board of Supervisors."

* * * * *

Sergeant Montgomery testified [R. 260] that "If the man persisted in eating what we called 'the dysentary dilcons and onions' he was usually slapped around a little bit."

* * * * *

[R. 318]:

Q. Sergeant, I take it you are an American citizen, aren't you? A. Yes, sir.

Q. And you have never been punished, have you, for slapping any Americans in the camp? A. No, sir.

and supervised it. [R. 208.] It had Japanese government, rules and regulations. Kawakita was under military orders at all times. [R. 4105-11.] The Japanese bowed to the Emperor every morning.

When the men would arise in the morning they formed in military fashion, they counted off like soldiers, and were sent out to their work on special trains to the mines. When they passed the guardhouse they had to salute the Japanese guards.

At the mine they were assigned to various levels of digging the earth by means of a pick and shovel, to dig up dirt that might contain nickel ore, then to load it into cars. The average quota for Japanese was 800 cars per day. [R. 3733-36.] Kiyoshi Mori, the engineer in charge of the camp, so testified. The quota set up for Americans was one-fourth of what the Japanese were required. Nevertheless, the quota being turned out was only 120 to 165 cars per day. Men would shovel the dirt containing ore into the dump cars, these cars would be dumped automatically. [R. 3733-38.]

Some time in November, or December, 1944, Kawakita told Sgt. Montgomery that the men would have to make a 200 car quota. Sgt. Montgomery was also told this by Lt. Hazama [R. 3733, 3759], the military commandant. Kawakita was told to convey this information by Tamura, one of the camp authorities. [R. 4079.] Kawakita said he interpreted and explained orders of the military and foremen. He was only in the mine a little over four months after the Americans arrived. The balance of the time he was a clerk in the warehouse.

The men seldom made their quotas as ordered by Military Lt. Hazama, however, and continued to do only be-

tween 120 to 165 cars per day. Sgt. Montgomery denied that he told the men not to fill the quota, but indicated that that was what the men agreed to do. They agreed that they would not fill the quota. His attitude was that while the Japanese "were standing over us I told the men to work." [R. 232.]

The men worked around the mine from about the time of their arrival at the mine, a distance of one hour's traveling time from the camp in the special trains in which the men went, from about 8:00 o'clock in the morning, to about 4:00 in the afternoon, with certain rest periods in between. Near the mine there was a medical officer, Japanese, to take care of anyone who needed emergency treatment.

The camp doctor, Dr. Lemoyne Bleich, an American Medical Doctor, a prisoner of war, set up a complete infirmary for the care and treatment of the men. Every day he would inspect the men to determine if they were physically fit to work, and to attend to their medical needs. The Japanese supplied such medicines and supplies as were available. For a time Dr. Bleich kept a complete diary of events in the camp; he was allowed to keep a complete list of the prisoners of war and their physical condition. A complete set of cards, which the doctor kept, were introduced into evidence, and are among the exhibits. Prisoners of war set up their own "court" for the offenses. Physical punishment attended these violations. Sgt. Montgomery slapped some men for stealing. [R. 227-8.] At no time did any man ever complain to American Captain Bleich that Kawakita had mistreated or struck him. Not a single card record reflects nor does Dr. Bleich's diary mention Kawakita as having inflicted any punishment.

After Kawakita arrived from China, some time in the later part of October, 1944, he appeared at the mine as an interpreter and interpreted orders between the Japanese guards and foremen to the American soldiers. Usually, he met with the guards the night before and found what their orders were. There were from 8 to 12 foremen. [R. 4062.] Kawakita would then explain to the Americans what the Japanese foremen told the prisoners of war to do, and sometimes demonstrated it because it was difficult to interpret. He never did this on his own initiative, but only as requested by the foreman. [R. 4061, 4063.] The prisoners of war remained at the mine until March 1, 1945.

During the time that the men were at the mine Kawakita carried an injured American prisoner of war to the hospital center located near the mine on his back for treatment. [R. 3792, 4082.] In order to do so he had to get permission from Mr. Tamura, the foreman at the mine. He helped prisoners of war get extra food supplies in the first part of November. He brought three jo of rice from the home of Kiyoshi Mori, with Mr. Mori's permission, because the prisoners of war said they were not getting enough to eat. [R. 3741-2.] He had to quit because the native Japanese population learned of it and criticized Mr. Mori. [R. 4084.] He also arranged extra dental attention for the prisoners and interpreted between them and the Japanese dentist. [R. 3743]. There were also medical facilities at the mine. [R. 3743, 3792-3.]

March 1, 1945, following suggestions by *Kawakita* to Kiyoshi Mori that the work at the mine was too heavy for the American prisoners of war, the American prisoners

were transferred to the factory near the camp. [R. 3738-9, 3767.] This was considered light duty for the prisoners. [R. 4098.]

As Inoue was the interpreter at the factory, Kawakita was assigned as a clerk in the factory March 1, 1945. [R. 4099; Exhibit AB.] [See the official company records Exhibit No. 6IDK (in English).] Kawakita acted as a bookkeeper [R. 4138] and kept charge of electrical supplies. [R. 4099, 4113, 4138.] A copy of those records, showing the type of work he did, is in evidence as Exhibit DK. [R. 4139.]

American medical orderlies were working at and around the mine. There was also a mine hospital.

From March 1st until the close of the war, and the surrender of the Japanese, to the ending of hostilities on August 10, 1945, Kawakita worked as clerk in the factory which was outside of the camp grounds. On occasions, not over once or twice a month, he would go into the camp on the orders of Lieutenant Hazama to assist Fujisawa and the Camp Commandant in interpreting letters and notes from various prisoners of war. [R. 4102.]

As Americans were winning the war, food was becoming scarcer and scarcer in Japan. This, likewise, affected the supplies in Camp Oeyama. The prisoners of war were also given four and five cotton blankets each for covering in their beds. There were also strict Japanese Government orders against any prisoners eating any vegetables out of the vegetable garden. The American doctor—Doctor Bleich—himself had issued such orders because these vegetables, on account of the nature of fertilization, would make the prisoners sick. It was a serious offense to steal any of the vegetables for that reason, as well as because

of the shortage of food. It was also a serious offense—it just about meant a prisoner of war's "neck" to steal or attempt to steal any food from the storehouse where it was kept. [R. 257.]

Two prisoners of war, J. C. Grant and Thomas J. O'Connor, admittedly burglarized the storehouse and stole scarce rationed food. Woodrow Shaffer stole beans. [R. 2058.] They were caught by the Japanese military authorities, who gave them prompt and severe summary punishment. Regulations covering this subject called for punishment up to the death penalty. (Overt Acts b and d.) O'Connor, it is alleged (Overt Act d) was struck and beaten and pushed into the fire drain or cesspool, and kept there for a time. Likewise, the same punishment was given to Grant. (Overt Act b.) Overt Act k, Shaffer incident. Prisoners were forbidden not only by the Japanese but by Dr. Bleich from stealing and eating vegetables. No other punishment, however, was administered for their burglary and thefts.

It is alleged that Kawakita came into the camp when these punishments were being administered by the Military in charge and that he assisted the military in the punishments being administered. These are charged as "*treasonable*" overt acts b and d and k, on which the jury convicted.

It was a very serious offense, also, for prisoners to cut up blankets or destroy any Japanese government property. Lt. Hazama ordered the prisoners to punish each other, by striking each other with their fists. This they carried on between a half an hour and an hour. Kawakita, according to the Government witnesses, came along when this was going on and allegedly assisted the Military in car-

rying out this punishment by observing the men and striking them when they failed to punch each other. The jury also found this (Overt Act c) to be an act of "treason."

Two other alleged overt acts of "treason" also occurred in the military compound as punishment. Two American prisoners of war, named Carrier and Simpson, along with others, returned into the camp earlier than the time regularly fixed for their quitting work. One of the Japanese Military Officers, Sergeant Ichiba, as punishment, ordered them to run around the compound until *he told them to quit*. Carrier and Simpson lagged behind and Kawakita, who had come into the compound, was supposed to have told them to "hurry up" and catch up with the others, and they were required to run around the compound a few more times than the other prisoners, for lagging. This also was found to be an act of "treason." (Overt Act g.)

The other alleged overt act was in requiring John J. Armallino to carry two buckets of paint, according to his testimony (which was the quota required of each prisoner of war to carry) when he was only physically able to carry one bucket (Overt Act j) and kicking him.

The jury, on all of the other transactions alleged, was unable to make any finding after eight days deliberation.

Right after the Japanese surrender on August 10, 1945, the Emperor made an announcement, and all of the Japanese officials listened and obeyed. They then turned the camp over to the Americans as their captors. At that time there were forty-five (45) American officers in the camp who had up to then been prisoners of war. The Senior American Officer, Major Martin, was placed in charge of the camp. The Japanese took orders from and

obeyed him. Sergeant Montgomery, Chief Counter-Intelligence Officer, who had been made the "so hanchō," or a sort of petty officer in charge of the Americans, by the Japanese, now acted on behalf of the Americans. At the trial he did not even remember the name of the Major who became the Commanding Officer of the Camp. [R. 251.] We mention this to show how the memory fades. Also, when shown a photograph of the American officers taken at the Camp, he was not able to pick out very many of them, or give their names. He also had difficulty in identifying the Japanese personnel.

Immediately upon the Americans taking over the camp, there was a flag raising ceremony. Kawakita became the principal interpreter and helper of the Americans. He reported to camp every morning about 7:10 and stayed there until nine o'clock at night. [R. 4149.] He took orders from Major Martin. He arranged to get a telephone installed at the camp. He aided the released prisoners of war to get food being dropped from B-29's together with two or three officers in getting medical supplies, food and clothing around the area to the Americans, and to be sure that the Japanese civilians in the area would not steal them. [R. 4150.] He went to Port Maizuru, a Japanese Naval Port, to interpret to Japanese families where some supplies had been dropped on some houses and made a big hole in the home. [R. 4151.]

He went with Major Martin and Lt. Thompson to the Police Station at Miazū (four or five miles from the camp and factory) to set up a prophylactic station for the prisoners of war who had started sight-seeing with Japanese girls, and in order that the prisoners of war could use the station as a prophylactic station. [R. 4152.] A

group of American officers had a big lunch at one of the big Japanese hotels, located on the shore (eight to fifteen officers were present) and they took Kawakita along to act as their interpreter and guide. [R. 4152-4153.] He took the men on an excursion trip and sight-seeing of the sceneries of Japan. [R. 4153.]

When the Americans got ready to leave, the defendant, Kawakita, and Major Martin went to see the Station Master to arrange a train, so many cars, so many coaches, so many baggage cars, for the freight to be taken to the destination. He arranged two different groups. [R. 4154.] Four different coaches. He assisted the men in getting off on September 9, 1945. He was the only interpreter at the station and went to the station for that particular work. He helped load all the things that the prisoners of war wanted to take and the supplies on the trucks. [R. 4154, 4155.] He saw them leave about 10:30 in the morning, greeted them farewell.

After the Americans took over, they beat up at least one Japanese guard in revenge. No one at any time attempted to strike or beat Kawakita. No one at any time ever interrogated him, or charged in Japan that he had committed any acts of treason. [R. 4155.] Title 18, Section 3 (1946 Edition) makes it the duty of any one who has knowledge of another having committed treason to report it immediately or himself be guilty of misprision of treason.

The Japanese lieutenant, Hazama, in charge of the camp and various other Japanese personnel were taken into custody shortly thereafter, but the defendant was not taken into custody. He remained in Japan and in November of 1945, went to work with the Wakasa Kogyo Kubushiki

Kaisha. [R. 4155.] This was an export and import company. [R. 4156.]

In December, 1945, the defendant went to the American Consul in Japan and asked if he could reinstate his American citizenship, or not. [R. 4156.] He told the Consul that he had his name entered in the family Koseki. This is corroborated by the document of the American Consul itself. The defendant told the Clerk at the American Consulate about it and he was informed that that did not affect him because he was a "dual citizen." "You are a dual national," she stated. [R. 4157.] Up to that time, he had not believed he was a dual national, but a Japanese national.

At all times after entering his name in the family Koseki, the defendant believed that he had *only* Japanese nationality. [R. 4197.] After he explained to the clerk of the American Consulate he had his name entered in the family Koseki and he showed her his family Koseki, she said: "You have dual nationality" and she told him that he would be thoroughly investigated by the counter intelligence corps of the army of the General Headquarters and if he was reinstated the Consul will notify him. [R. 4157.] He told her he had been working as an interpreter of the Kogyo Wakasa Kogyo Kabushiki Kaisha and he was listed as a clerk. [R. 4158.] She typed up an affidavit, which he signed. It was about the first part of February, 1946, that he received the letter that his status as an American was reinstated and that he was thoroughly investigated through the Counter Intelligence Corps of the General Headquarters. [R. 4159.] The lady at the Consulate did all of the typing. [See Exhibits 2(a) to 2(i), incl.]

The American Consulate made a finding of *dual nationality* and after two months of investigation made its conclusion and finding after he had been screened by the Counter Intelligence Corps and investigated by them.² [R. 4171.]

"In the opinion of this office, he has not actively collaborated with the enemy, nor engaged in activities inimical to the best interest of the U. S. beyond the minimum necessary to earn a livelihood. A check of the records of the U. S. Army C. I. C.³ in Japan reveals no adverse information concerning him." [R. 4174, Exhibit 2F.]

He thereafter awaited an opportunity to return to the United States. He visited Army Headquarters at least twenty times and visited the American Consulate an equal number of times. [R. 4177 *et seq.*] Transportation funds were arranged for him in the United States sometime in June. In the meantime he had remained in Japan, constantly reporting to the Consulate and to the Army. No effort was ever made to arrest him, or otherwise to charge him with any offense, either of war crimes or treason.

The Consulate made a finding that the defendant "has presented evidence deemed satisfactory to overcome the presumption of expatriation," *as of the date of the finding thereof in 1946*. A passport was authorized to extend to December 31, 1947. The document was signed Meredith

²The American consulate has the power to arrest and even try Americans abroad. Military tribunals were also operating in Japan under General Douglas MacArthur.

³C. I. C. is Counter Intelligence Corps. Sgt. Montgomery at the camp was a member of the Counter Intelligence Corps.

Weatherby, American Consul in Japan. [R. 4175.] The passport to return to the United States was issued June 20, 1946. [R. 4178.] *On the day before that* [R. 4177] *the defendant put in an application with the Japanese Government to divest himself of Japanese nationality.* [R. 4177.]

Thereafter he returned to the United States. He went to live with his father at Los Angeles, California. He went to the University of Southern California, where he attended classes with a number of G. I.'s including one who had been a prisoner of war.

Thereafter, while he was in Sears Roebuck and Company in Los Angeles, California, in September, 1946, a former prisoner of war named William Bruce, and deeply affected by his war experiences, bumped into him—not literally but actually—in the Los Angeles store. Kawakita, so he said, had stopped him from eating a Japanese nut and had interrupted his smoking. [R. 2760-2767.] So upon seeing Kawakita, whom he recognized as one of his former guards in Japan, he told his wife that he had just seen someone he wanted to kill. [R. 2773.] His wife, he said, told him he had gone crazy. [R. 2773.] He followed the defendant out of the store and got the automobile license number of the car. This was when “treason” as far as Kawakita was concerned was “born.”⁴

Thereafter, Bruce reported the matter of seeing one of his Japanese guards to the Veteran's Administration and

⁴Bruce was not a witness to a single overt act of treason found by the jury against the defendant. His testimony regarding refusing to let him eat a nut or smoke (and for which he wanted to kill Kawakita) was admitted on the theory of intent [R. 2756]. Smoking without authority was forbidden by Article 8, page 22, Rules of Prisoner of War Camps [Ex. CS] to prevent fire hazards.

the Government and an investigation commenced of Kawakita being in the United States. [R. 2774.]

No one accused Kawakita of treason even then, not even Bruce and furthermore no arrest or accusation was made of him from that date for almost a year thereafter, to-wit, in June, 1947. Bruce did not even know the correct pronunciation of the defendant's name. [R. 2779.]

Kawakita was arrested by F.B.I. Agent Jerry Sawtelle at the home of his father in Los Angeles. There was no warrant for his arrest and he was not informed of the charge on which he was being arrested. He did not know why he was taken to the commissioner's office, where for the first time a Commissioner's warrant was issued against him on information and belief sworn to by Jerry Sawtelle. While the complaint sets forth an alleged charge of treason, it does not set forth any basis of knowledge of the F.B.I. Agent, who was never shown to have been outside of the United States.

After being held by the F.B.I. for more than two hours, Kawakita was arraigned before the magistrate, on the complaint sworn to by F.B.I. Investigator Jerry Sawtelle, who never claims to have been in Japan, or to have actually had any personal knowledge of any of the transactions.

Thereafter, Kawakita was indicted by the Grand Jury in an indictment which charged overt acts (a) to (i) as they are in the present indictment. Objections to the jurisdiction of the court and to denial of the right to speedy trial in Japan, where the witnesses of defendant were available were denied. [R. 36, Tr. of June 27, 1947.]

Motions to dismiss the indictment because Kawakita had not been lawfully arrested on probable cause, and because the facts alleged in the indictment could not and did not

constitute treason in the setting where alleged and that jurisdiction was lacking [R. 36-38], were argued and denied by the trial court. A demand was made for the inspection of the grand jury minutes to determine if there were facts set out in those minutes. Up to the time that Kawakita was brought before the United States Commissioner, on June 5, 1947, he had not been told or questioned by anybody in the world regarding any alleged charge of treason. [R. 4274.]

The defendant demanded the right to inspect the minutes of the Grand Jury to see if any competent testimony had been presented before them on which to base an indictment—that is to say, whether there had been a single competent witness before the Grand Jury to any alleged overt act of treason. The motion to interrogate the foreman of the jury with questions propounded of the foreman of the jury, were not permitted and objections thereto by the government were sustained by the trial court. [R. 39 *et seq.*]

When a second and superseding indictment returned adding overt acts L, M, N, and O to the indictment, the motions were renewed and efforts were again made to determine if there was any competent evidence before the Grand Jury, or whether the same evidence was considered in returning the superseding indictment, and these efforts were also blocked by the trial court, and motions to dismiss were denied.

All argument theretofore made, on the first indictment, were incorporated by reference and considered by the trial court on the motions to dismiss the superseding indictment.

The trial commenced on June 18, 1948. Twelve jurors and two alternates were selected. Objections were made to having two alternate jurors present, as in violation of

the Constitutional right of trial by jury as that term is understood in the Seventh Amendment to the Constitution of the United States, and to have such alternate jurors present at all times with the twelve regular jurors. The challenge to the alternate jurors and the motion to discharge them was denied by the trial court.

Thereafter commenced a parade of ex-war veterans, many of whom had suffered deeply from their war experiences, and secured shock treatment in hospitals after the war and had been treated for war psychosis. Some of these men are still in the service, and all of them received promotions after their war experiences; they depicted their conditions of labor and alleged punishments received by them from time to time. In each instance the punishment was for an alleged infraction of the rules of the camp or the failure to perform work required in the mine, or in other disciplinary matters, or for actual acts and crimes against the laws of Japan and regulations for the government of prisoners of war in P. O. W. camps established pursuant to treaties between the United States and Japan. [Exs. CS., CT. to CW., R. 227-238; 205-8.]

Thereafter the trial continued to September 2, 1948.

The government conceded that Kawakita was at all times covered by the indictment a citizen of Japan, residing in Japan and drafted to work by the government of Japan in Oyama, Japan.

By reason of the Nationality Act of 1940, Subd. a, b, c, d, Section 402 (U. S. C. Section 802) he was presumptively and actually expatriated—that is, presumptively a *non-citizen*, of the United States.

Not a single specific act showing intent to betray was presented, only isolated statements of expressions, discon-

nected with any overt acts, and designed to influence passions and prejudices, were permitted to be introduced into evidence.

After retiring to deliberate, the jury pondered four days in the summer heat, then requested to be discharged. The court sent them out for further deliberation and declined a motion to discharge them. The foreman of the jury became ill with nervous exhaustion and a doctor had to be called. The defense was not informed of that fact. Six days of deliberation produced a request from four of the jurors for discharge. The foreman pleaded to be discharged; all to no avail. Jurors stated that they had considered every phase of the case and were unable to agree. Again the court refused to dismiss them. The foreman of the jury twice asked for dismissal. Juror Clancy said "everything" had crept into the jury room and it was evident that feeling ran high. The foreman did not wish to sit with other jurors in the bus, for fear of hitting one of them. The judge ordered the jurors to return to the jury room. Mrs. Zeigler, a juror, said she did not feel like returning, but was compelled to do so. The judge, over objections, gave new and further instructions, telling them it was their *duty* to agree and that the minority should listen to the majority.

The jurors separated some of the time while not in the deliberating room. Doctors were called to attend the jurors during deliberation—without knowledge or notice to the defendant or his counsel.

Two and a half more days in a hot and ill-ventilated jury room produced a verdict as to some of the overt acts. Others were not withdrawn, but were not decided.

The judge declined to poll the jurors as to which two witnesses they thought established the overt acts and declined to send them back to decide the undecided overt acts and the government did not withdraw them.

The trial judge imposed the extreme sentence of death to the defendant for the eight overt acts—five of them for allegedly assisting the military in summary punishments—two for burglary, and thefts, and destruction of Japanese government property, another for being made to carry two buckets of paint instead of one, two others because they were disciplined to run around a compound a few extra times, and another who was injured and not moved back to the camp for a few hours when no transportation was shown to be available.

All motions for a judgment of acquittal and for a new trial were denied.

SPECIFICATION OF THE ASSIGNED ERRORS.

I.

The Evidence Is Insufficient to Support the Verdicts.
The Verdicts Are Contrary to the Law and the
Evidence.

CITIZENSHIP AND THE QUESTION OF ALLEGIANCE.

- (a) The Evidence Is Undisputed and the Court Instructed the Jury That Kawakita Was a Japanese Citizen at All Times, Owing Allegiance to Japan.

He was a Japanese citizen, residing in Japan and as such owed *one hundred percent* allegiance to Japan. His duty of allegiance at the time therefore had to be measured by Japanese law, not American law.

- (b) By Operation of American Law, To-wit: the United States Nationality Law of 1940, He Was Presumptively Expatriated—That Is, He Was Presumptively Not a Citizen of the United States* During the Entire Period of Time Specified in the Indictment. Therefore, He Could Not Be Guilty of Treason as a Matter of Law.

- (c) He Owed No Allegiance to the United States in the Setting of This Case and Under the Conditions of This Case.

Title 18, Section One, is applicable only as to persons who *owe allegiance to the United States*.

*The forms of the State Department use the expression "Presumption of Noncitizenship" in respect to one presumptively expatriated. It is Form 213—Foreign Service. See Exhibit 2F.

The Fourteenth Amendment, by reason of which Kawakita became a citizen at birth, applies citizenship only to persons of whom the United States has jurisdiction. Kawakita being a citizen of Japan, and not within the jurisdiction of the United States, was not one owing allegiance to the United States.

(d) Even if the First Two Contentions Are Not Sustained, He Must Be Deemed to Have Elected Japanese Nationality Either Under the Terms of the Nationality Act of 1940 or by His Acts and Conduct, and as Such Was Actually Expatriated as a Citizen of the United States During the Time Mentioned in the Indictment.

(e) Kawakita Lost His Nationality by His Own Voluntary Election:

- A. By remaining in Japan more than two years. (Title 8 U. S. C. 801a.)
- B. By reaffirming his allegiance through a formal declaration in his family Koseki to Japan. (Sec. 801b.)
- C. Accepting a position as an interpreter for military personnel of the Government of Japan and in connection with prisoners of war. (Subdivision (c), Title 8, U. S. C. 801.)
- D. By performing the duties of interpreter under the Government of Japan in a military area while having Japanese nationality and for which only Japanese nationals were eligible. (Sec. 801d.)

E. Using a passport of a foreign state as a national thereof Kawakita went to China on a Japanese passport in July of 1944 and returned in October, 1944. To travel on a Japanese passport it was of course necessary to take a formal oath or affirm his allegiance to Japan and he traveled under its protection.

(f) Venue Was Lacking. Upon Its Conquest Japan Became a District of the United States, Where Kawakita Was "Found."

II.

Treason Was Not and Could Not Be Established as a Matter of Law in the Prisoner of War Camp in Japan, Operating Pursuant to Treaty With the United States and Under the Laws of Japan and Prisoner of War Regulations by Japan Regarding the Conduct of That Camp.

(a) The Camp Was Under the Control of the Military Authorities of Japan and It Was Conceded in the Trial That the Military Authorities Directed and Commanded the Camp, and All Its Activities. The Americans Were a Disarmed Labor Battalion, Employed and Paid Under International Law. There Could Be No Treason in Any of the Acts Showed in This Setting.

(b) There Was No Evidence Throughout the Entire Case of Any Intent to Betray, by Means of the Overt Acts, or in Any Other Way.

(c) The Acts Charged and Found by the Jury Were in and of Themselves Trivial and Inconsequential in Relation to the Charge of Treason, and in No Wise Consisted in Delivering Up the United States to Its Enemy. They at No Time Were in Furtherance of Treason or Betrayal of the United States.

- (d) There Was No Aid and Comfort to the Government of Japan. The Alleged Acts Did Not Help Japan Win the War nor Help to Cause the United States to Lose the War.
- (e) The Proof Was Insufficient to Establish Any of the Overt Acts by the Testimony of Two Witnesses in the Whole of the Overt Act. The Times, Places and Occurrences, Were Uncertain and Indefinite and Did Not Measure Up to the Constitutionally Required Standard.
- (f) There Was No Proof of Continuous Treasonable Conduct as Alleged in Paragraph III, Page 2 of the Indictment.
- (g) There Was No Proof of Paragraph IV of the Indictment That Kawakita, Compelled Members of the Armed Forces of the United States, Who Were Then and There Held by the Japanese Government as Prisoners of War, to Perform Labor at Said Open Pit or Mine and Smelter; or That He Directed and Assisted the Japanese Military Forces in the Imposition of Discipline and Punishment on Members of the Armed Forces of the United States. The Proof Was to the Contrary.
- (h) There Was No Proof of Any Acts in Furtherance of an Intent to Betray. The Evidence Is Uncontradicted That Kawakita by His Acts and Conduct at All Times Thought He Was Solely a Japanese Citizen Owing 100% Allegiance to Japan. The American Statute Presumptively Expatriating Him Making Him a Non-citizen and American Regulations Informing Him That His Paramount Allegiance Was to Japan Entitled Him to This Belief and Estops the United States From Claiming Any Loyalty or Attributing Treasonous Intent to Him.

III.

The Court Erred in the Admission and Exclusion of Evidence in the Trial of the Case.

- (a) The Trial Judge Admitted, Erroneously, Over the Objections of the Defendant, Isolated Acts, Distorted and Disconnected Acts or Statements to Show "Intent" to Betray. This Was Error. [See Appendix.]
- (b) The Trial Judge Erred in Excluding the Deposition of Mayor Sugimoto [Ex. CO].

IV.

The Court Erred in Other Rulings in the Case.

- (a) The Court Erred in Its Interpretation of the Nationality Act of 1940, in Holding That These Were the Only Methods by Which the Natural Right of Expatriation Might Be Expressed and in Holding That Section 808 of the Nationality Act, Inherently and Construed and Applied, Was Not Unconstitutional.
- (b) The Court Erred in Failing to Grant the Judgments of Acquittal at the Close of the Government's Case and at the Close of the Defendant's Case.

V.

The Court Erred in the Instructions Given and Refused.

- (1) The Court Erred in Its Instructions Regarding the Rights and Duties of a Dual Japanese and Presumptively Expatriated American Citizen Residing in Japan, One of Its Citizenship.

- (2) The Court Erred in Holding and Instructing the Jury That a Dual Citizen Residing in Japan at a Time When He Was Presumptively Expatriated From the United States, Did Not Owe One Hundred Percent Allegiance in Japan to the Japanese Government, and That He at That Time Owed Allegiance to the United States.
- (3) The Court Erred in Its Instructions Limiting the Ways in Which Expatriation May Be Effected.

The Court Erred in Instructions Refused.

VI.

The Procedure Followed During the Deliberation of the Jury Violated Appellant's Right to Fair Trial Guaranteed by the Fifth Amendment to the United States Constitution.

- (a) The Court Erred in Compelling the Jury to Continue Deliberating for Eight Days and Thus Coercing the Verdict, After a Jury Had Twice Requested to Be Discharged, and the Court Told the Jury It Was Its Duty to Return a Unanimous Verdict.
- (b) Jurors Were Ill and Were Visited by a Doctor Without the Knowledge or Consent of the Defendant or His Counsel, or Without Being Informed at Any Time During the Deliberations. The Orders Permitting Doctors to Visit and Attend Jurors Were Made Outside the Presence of the Defendant and His Counsel. They Were at No Time Informed. This Deprived the Defendant of the Right to Be Personally Present at Every Stage of the Proceedings (Rule 43, Rules of Criminal Procedure), and Deprived Him of Rights Guaranteed by the Fifth Amendment to the United States Constitution, and to Trial by Jury Guaranteed by the Sixth and Seventh Amendments to the United States Constitution.
- (c) The Jury Separated, Without Leave of Court, During the Eight Day Period Above Referred to.

VII.

The Court Erred in the Instructions to the Jury Given Six Days After Retirement and When the Jury Had Failed to Agree After Reporting That It Had Considered Every Phase of the Case and Was Unable to Agree. The Court's Instructions That the Minority Should Listen to the Majority and That It Was Their Duty to Return a Unanimous Verdict Were Prejudicially Erroneous.

VIII.

The Court Failed to Exercise Discretion in Imposing the Death Sentence and in Inferentially Criticizing Other Courts and the Executive for Not Inflicting the Death Penalty in Treason Cases.

IX.

The Trial Court Committed Several Procedural Errors in the Trial of the Case.

Specification of Procedural Errors in the Case.

(a) The trial court erred in failing to dismiss the indictment for failure to state an offense against the laws of the United States.

(b) The trial court erred in refusing to permit the defendant to inspect the minutes of the Grand Jury to determine if it proceeded upon legally competent evidence.

(c) The trial court erred in denying certain features requested in a Bill of Particulars and in limiting the scope and extent of the Bill of Particulars in permitting amendments to the Bill of Particulars during the trial.

(d) The trial court erred in holding that the defendant had not been denied a speedy trial while in Japan. If he had committed treason it was the duty of those who knew it to accuse him promptly. (Title 18, Section 3 (1946 Edition.)

(e) The trial court erred in refusing to permit testimony to be taken from the Foreman of the Grand Jury as to the composition of the Grand Jury, as to the number of witnesses to each overt act.

(f) The trial court erred in holding that jurisdiction was in the United States—Los Angeles, California—and not in Japan where the United States had occupied Japan and had military government.

(g) The trial court erred in refusing to discharge the two alternate jurors and in holding that a jury of fourteen instead of twelve may sit in a treason case, and that this is a common law jury.

(h) The trial court erred in permitting the jury to separate, illegally, after its retirement.

(i) Outsiders were permitted to contact the jurors during their deliberations, without the defendant or his counsel being informed at any time during the trial, or his consent or approval being received. These included three different doctors at two different times. This deprived the defendant of due process of law guaranteed by the Fifth Amendment and violated Rule 43 entitling him to be present and informed at every stage of the proceedings. Illness of one or more of the jurors was such a fact as should be promptly communicated to counsel and the accused and they should be informed in open court.

(j) The trial court erred in the length and manner of deliberation which it held the jury and in telling them it was their duty to agree when it had become evident they could not do so unless some of them surrendered their conscientious convictions—which was coercion of the jury.

(k) The trial court erred in refusing to dismiss the jury on several requests to be discharged.

(l) The trial court erred in failing to retain the jury for further decisions one way or the other on the five remaining acts, in the indictment having submitted special findings to the jury and the jury having disagreed as to the same, the result was a disagreed jury.

(m) The trial judge erred in refusing to poll the jurors as to which overt act or acts and as to which witnesses the jurors thought established the overt act.

(n) The trial court erred in refusing to send a definition to the jury—giving the definition of the word “betray” after it had requested such a definition, except one that came from a desk book dictionary that was entirely inadequate.

(o) The trial court erred in discharging the jury without a unanimous finding on each of the special verdicts submitted to it.

(p) The trial judge erred in failing to submit the issue of punishment to the jury. Such punishment lay in the discretion of the jury and not the judge and was an issue to be found by the jury.

(q) The motions in arrest of judgment should have been granted. The motion for judgment of acquittal should have been granted.

(r) The sentence of death was arbitrary and capricious and unwarranted.

Summary of Argument.

I.

Tomoya Kawakita was, at all times mentioned in this indictment, a Japanese citizen within the jurisdiction of the then Japanese nation. The court instructed the jury "according to the law of Japan, the defendant himself by reason of his Japanese parentage was from birth a Japanese National or subject, owing allegiance to Japan." [R. 5504.] He was then residing in Japan and had resided in Japan for five years. Therefore, under the terms of the Nationality Act of 1940, he was presumptively expatriated from his American citizenship and owed 100 per cent allegiance to Japan and no allegiance to the Government of the United States during the entire time covered by the indictment. A presumption of expatriation is a presumption of non-citizenship.

Section I of Title 18 (1946 Edition) provides that the crime of treason applies only to persons "owing allegiance to the United States. The section reads:

"Section 1. (Criminal Code, section 1.) *Treason.* Whoever, *owing allegiance to the United States*, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason. (R. S. Sec. 5331; Mar. 4, 1909, c. 321, Sec. 1, 35 Stat. 1088.)"

The Fourteenth Amendment to the Constitution of the United States provides as follows:

"All persons born or naturalized in the United States, *and subject to the jurisdiction thereof*, are citizens of the United States and of the State wherein they reside."

The presumption of expatriation removes Kawakita from the jurisdiction of the United States during the period of presumptive expatriation.

Kawakita, being a dual citizen, owed 100% allegiance to the country in which he was residing and whose protection he was receiving. He owed no allegiance to the United States, which had by Statute and Regulation presumptively expatriated him—presumed him to be a non-citizen—and had not afforded him any protection nor accorded him any of the mutual obligations of citizenship. Nor was he during that time within the jurisdiction of the United States.

A Japanese subject, born in the United States of Japanese parents, whose parents were born in Japan and are Issei, and who by reason of that fact has Japanese citizenship, and who is thereafter drafted to work in a prisoner of war camp by the Japanese Government while thus residing in that country, cannot be guilty of treason to the United States any more than if he was drafted into the shooting forces and killed our soldiers. He is, by the laws of that country, a part of the enemy and is bound to a hundred per cent loyalty to that government while residing in that country and while drafted to work for that country, or to fight for that country in war. If he resided in the United States and was drafted by the United States Government either to fight for it or work for it he would owe the United States 100% allegiance during that time.

The Government of the United States has recognized dual citizenship, and through its Political Branch the State Department has set up its policy of dual citizenship, and the courts are bound by that holding.

By the principles of that doctrine an American with dual citizenship must legally expect and realize and believe that he becomes *presumptively* expatriated from his American citizenship if he resides in the other country six months or longer, and that his obligations to the United States ceases after that time and that the obligations of the United States to protect him ceased during that time.

The Government of the United States, by reason of its announced political policy toward dual citizens, is estopped to charge such a one with treason when he gives his paramount allegiance to the country in which he is residing and whose citizenship he admittedly possesses, and where this country, by its own laws presumes him to be a non-citizen of the United States. The policy of the State Department is entitled to great or controlling weight.

Mexico v. Hoffman, 324 U. S. 30, 38, 42;

Perkins v. Elg, 307 U. S. 325;

United States v. Johnson, 124 U. S. 236, 31 L. Ed. 389;

Reid v. United States, 73 F. 2d 153, 156 (C. C. A. 9).

Tomoya Kawakita was a Japanese subject, born in the United States of Japanese parents, whose parents were born in Japan, and whose parents are Issei by reason of that fact had Japanese citizenship. While residing in Japan when the war broke out he was drafted as a Japanese subject and compelled to work in a Japanese prisoner of war camp by the Japanese government. He could not be guilty of treason to the United States, since he was by our law a part of the enemy and was bound to 100 per cent

loyalty to that government as one of its citizens residing in that country. The Government of the United States recognized dual citizenship.

Under the doctrine of dual citizenship, such dual citizens owed his paramount allegiance to the Japanese government and as such was bound to obey the orders of the Japanese government and owed that government a hundred per cent loyalty while in that country in return for the protection that it gave to him as a citizen of that country. This protection consisted in the unmolested right to go about as he pleased, to live there, to eat its rationed and scarce food, and to be protected by its military forces as far as they were able to do so against outside territorial attack upon its sovereignty, just the same as Japanese subjects residing in the United States and holding dual citizenship owed one hundred per cent loyalty to the United States while in this country and were bound by its laws and regulations, including being subject to the draft or punished for evading it. Kawakita was such a dual citizen, residing in Japan. Moreover he was presumptively expatriated from the United States because of his dual citizenship and acts, under the Nationality Act of 1940.

II.

The petty acts charged in this case on which the jury made findings did not and could not rise to the dignity of treason nor in their setting constitute acts of treason nor in furtherance of any treason, nor treasonable designs, even assuming a possible contingent allegiance owing to the United States from the defendant if he returned to the United States.

III.

All of the alleged acts were committed in connection with prisoners of war, who were a labor battalion within the confines of Japan and were governed by international treaty and therefore subject only to the laws of Japan. Two of the alleged acts constituted minor acts of alleged assault for not performing the required quota of work required by the camp authorities, under International and Japanese law. A third consisted in the failure of returning a person injured while at work to the camp prisoner of war hospital supervised by an American prisoner of war doctor as promptly as he thought he should be returned. The other five acts alleged consisted of aiding the military in punishments for committing the serious offenses of theft of scarcely rationed food products, which deprived other prisoners of war of the like quantity of food products. Discipline to prevent thefts was necessary to protect other American prisoners of war and was of benefit to them. [See Testimony of Capt. C. M. Bleich, American prisoner of war doctor in charge, in Appendix.]

Beatings were administered by both American and British prisoners of war to other prisoners as punishment for their violation, without constituting treason.

American Sgt. Montgomery admitted he administered beatings himself for thefts. [R. 248.]

General Patton slapped an American soldier in Italy without being punished for treason—in fact without being punished.

The Japanese punished their own people by striking or beating them. [R. 4026, 4029.]

IV.

The conduct of the prisoners of war camps in Japan were governed by the Hague Convention, to which Japan agreed *mutatis mutandis* to be governed through International agreement with the Swiss and American governments. Under this treaty the prisoners were *in the power of Japan* and were subject to all the laws, rules and regulations of the Japanese Government as well as the Japanese prisoners of war camp rules and regulations having the force of Japanese law.

Such punishments within Japan therefore could not and did not constitute treason, whether carried out by an American subordinate in the camp, or whether carried out by a Japanese-National who had American citizenship by reason of his birth in the United States, and who had resided in Japan for more than five years.

Under local law and pursuant to treaty, the Americans could have been given the death penalty for their acts of theft. Summary punishment was administered instead and probably saved more severe penalties.

V.

The presumption of expatriation contained in Sections 401 (a) (b) (c) (d) and 402 of the Nationality Act (Title 8 U. S. C. 801 and 802) applied to the appellant, who had lived in Japan more than two years—(five years)—and whose passport had expired and had not been renewed, and who had given his residence as Japan. Such presumption of expatriation existed at all times during the period covered by the overt acts charged in the indictment. Even if such presumption was overcome by the appellant at and as of a later date to the satisfaction of

the American Consul, it did not relate back to the time when the presumption prevailed. 54 Stat. 1169; 8 U. S. C. 802 and State Department Passport Regulations 315.9 so state.

VI.

The evidence is entirely insufficient to prove treason. There is utterly lacking any proof of any treasonable intent; that is, to commit any of the acts alleged with intent to *betray* the United States of America.

An intent to betray is a specific intent requiring specific proof of intention to deliver America into the hands of the enemy. It has to make the enemy stronger or America weaker. The acts found could not and did not do either. Sometimes the overt acts themselves establish such intent, as where one delivers military secrets to an opposing government, such as General Benedict Arnold did to the British Government. But, where the acts are in and of themselves of an innocent nature consisting, as here, merely of alleged simple assaults or assistance of the military in carrying out military punishments for serious crimes, the proof of the specific intent must be clear and convincing beyond a reasonable doubt and to a moral certainty. No such proof existed in this entire record.

The mere alleged statement of the defendant regarding General MacArthur, by telling prisoners of war to hurry up, to do more work, or to send fewer crews to the carrying of a log, or to run around a military compound a little faster, and that he did not like the United States, did not show any treasonable intent—either by themselves, separately, or in their setting—as required by *Cramer v. United States*, 325 U. S. 1.

VII.

There was no proof that any of the acts committed gave any aid or comfort to Japan. The Government of Japan certainly would not cite Kawakita or give him a decoration or an "E" for giving it any aid or comfort in any of these acts, nor would we find Tojo or the Emperor glorying in any of them as giving the Government of Japan aid and comfort. They never heard of Kawakita during any of the time of this case; neither did Kawakita's employers. Treason required knowledge and co-operation by the organized Government of Japan and its authorized agents acting toward the treasonable purpose and design. This essential element was lacking.

VIII.

As far as giving "aid and comfort" to the Government of Japan is concerned, the very recitation of the acts alleged reduce this formula to a ridiculous conclusion. If anything, the acts on their face would tend rather to aid the rest of the prisoners of war, since one man shirking his job by doing less work imposes burdens on other men to do the work that was required under the work requirement. Also, stealing scarce food deprived the other prisoners of war of their proportionate portion of the articles. The American prisoner of war doctor had for medical reasons forbidden the prisoners from stealing and eating vegetables.

IX.

The acts thus lack any inherent quality of any treasonable character.

X.

The proof is that the defendant did not adhere to the enemy. He *was* the enemy within the meaning of International Law, the Law of Nations and our own court decisions thereon. There is a distinction between being the enemy itself and being apart from the enemy and *adhering* to it, giving it aid and comfort.

XI.

The Japanese Government had drafted Kawakita as one of its subjects, owing loyalty to it. Had he disobeyed he would have been guilty of treason to Japan.

XII.

The defendant had expatriated himself under the provisions of the Nationality Act of 1940. He had elected Japanese citizenship. He had reaffirmed his allegiance to the Government of Japan. Such a reaffirmance constituted an *affirmation* within the meaning of the Nationality Act. Japan so construed his acts, and drafted him as one of its Nationals.

He had also taken an oath of allegiance to Japan and had engaged in employment in which only Japanese Nationals were eligible, in a company which had been drafted by the Japanese Government and was therefore controlled by it and a part of the Government of Japan.

XIII.

The Court below misconstrued the Nationality Act as being the sole way of losing one's nationality or expatriating ones self.

The International Law and the Law of Nations is equally a part of the Constitution of the United States,

and any way in which one may lose his nationality under International Law is binding on the Government of the United States.

XIV.

Assuming that the defendant did not lose his American Nationality or actually expatriate himself, or that the State Department could make a contrary finding, as a political or administrative determination at a later date, the evidence is uncontradicted that during the entire period covered by this case that the defendant honestly believed himself to be a Japanese National.

XV.

The trial court erred in the admission of a mass of irrelevant evidence which in no way showed treasonable intent. Such evidence should have been stricken, and the jury instructed to disregard it. This was highly prejudicial and inflammatory.

XVI.

The trial court also should have granted the defendant's motion to dismiss the indictment—or entered judgment of acquittal at the close of the government's case and to grant the motion for judgment of acquittal at the end of the defendant's case.

XVII.

The court erred in rejecting the deposition of Ryuzo Sugimoto who gave his interpretation of the Municipal Law regarding one's registering his family name in the Koseki as it applied to the defendant.

The weight of the testimony was for the jury, not for the court.

Summary of Procedural Errors.

(a) At the beginning of the case the appellant sought to question the foreman of the Grand Jury as to whether there were two witnesses before the Grand Jury as to the alleged overt acts. It was error for the trial court to deny this motion for an inspection of the minutes of the Grand Jury.

The constitutional requirement regarding two witnesses applies equally to an indictment as to the evidence in the trial of the case. An indictment should not be returned except upon the best evidence available and in sufficient quantity to warrant the return of an indictment as fundamental as that of the charge of treason.

(b) The trial court erred in overruling the motion of the defendant that he was entitled to a speedy trial in Japan, the status of the alleged acts, where he could get witnesses in his behalf. The defendant, although remaining in Japan almost a year after the alleged occurrences, was not arrested and was cleared by the Army Intelligence of any wrongful activities. Had he done anything wrong, he would have been seized by the American military in Japan and subject to court martial under the Articles of War. Any act of treason subjected him to such seizure and punishment. Also any officer or man who failed to report such treason was guilty of misprision of treason. (Title 18, Section 3.) Military government and military tribunals also were available.

(c) The trial court erred in denying the defendant's motion objecting to alternate jurors, Rule 24, as in violation of the defendant's constitutional rights to a trial as at common law by a jury thus constituted, consisting of

twelve persons, no more, no less, under the Seventh Amendment to the Constitution of the United States.

(d) The jury, after it retired to deliberate, separated without leave of court. They were allowed to run around on different floors in the hotel and visit each other, without restraint or restriction. Some remained in the lobby of the hotel; some went upstairs and they were on the loose. Some were sick and required medical attention without the defense being informed. Doctors secretly visited and treated jurors.

(e) The trial court erred in not discharging the jury after they stated after four days of deliberation that they were unable to agree and had considered every phase of the case.

The court further erred in failing to discharge them after they had continued deliberating for a period of six days and still said they were disagreed and wanted to be discharged, and the foreman and other jurors requested that they be discharged.

A verdict thereafter was a verdict under compulsion and coercion.

(f) The trial court erred in instructing the jury, over the defendant's objection, that it was their duty to reach a unanimous verdict and what constituted a "majority rule" and that the "minority" should listen to the "majority." There are no such duties to agree or rules for jury deliberation for the minority to surrender to the majority.

These are not the rules that apply in criminal cases. Each juror must be satisfied beyond a reasonable doubt and not be changed as to his findings merely because there is a majority on the other side. Nor is there any law anywhere that says it is the jury's duty to reach a unanimous verdict.

The holding out of the jury for a period of eight days in the setting and atmosphere it was in constituted coercion and forced a verdict.

This denied fair trial guaranteed by the Fifth Amendment to the Constitution of the United States.

(g) The trial court erred in refusing to instruct the jury fully, as to the meaning of the words "loyalty" and "allegiance" at their request after they had retired to deliberate and had requested the court to give them the actual meaning of these words.

The defendant thereafter tendered an instruction from the unabridged dictionary which the court merely filed and refused to give to the jury.

(h) The trial court failed to poll the jury when they came in with their purported verdict as to the two witnesses that each juror thought established the alleged overt acts.

Since the testimony was very indefinite and vague as to the date and times and persons who saw the various acts, the defendant had a right to have each juror express himself or herself as to the individual overt act and as to the witness he or she thought established it. It was

impossible to tell whether the jurors had really agreed as to which witnesses had in fact established each overt act. This was emphasized by the fact that during the deliberations the jurors returned into court and one of the jurors asked some details about a witness to an overt act, a witness that had not testified at all to the overt act regarding which the juror asked.

(i) The trial judge arbitrarily pronounced the death sentence.

The punishment of death for the reasons given by the trial judge was an abuse of discretion and of the clear intent and purposes of both the framers of the Constitution and of Congress.

The trial court's arbitrary statement critical of other courts and the executive shows that he exercised no discretion whatever and that he believed that in any case a person convicted of treason should suffer the death penalty because a traitor's life isn't worth anything anyhow. An exercise of discretion is required before such penalty is inflicted. The penalty in this case is for the jury to fix.

(j) The trial court erred in the instructions given on citizenship and the duties and obligations of a dual citizen residing in Japan and in refusing others.

(k) The trial court erred in its ruling that one may only be expatriated under the Nationality Act of 1940 and that that act provides the exclusive method of losing American Nationality.

ARGUMENT.

I.

The Evidence Is Insufficient to Support the Verdict.
The Verdict Is Contrary to the Law and the Evidence. The Evidence Is Wholly Lacking to Support the General Verdict or Any of the Special Findings of the Jury, Either as to Citizenship or as to Any Treasonous Acts, or Any of the Essential Elements of Treason. Nor Were There Two Direct Witnesses to Each Overt Act Found by the Jury.

The jury found the appellant guilty of treason on the basis of eight alleged overt acts out of the fifteen charged in the indictment,—thirteen of which were submitted to the jury,—but none of these overt acts so found against appellant, singly or collectively, either proved treason or were in furtherance of treason.

We assert, confidently and most vigorously, that the petty nature of the acts found against appellant did not rise in and of themselves nor in their setting to the dignity of the greatest crime on our federal penal statute, to-wit, Treason.

We assert, vigorously and confidently also, that the crime is *treason*, not the overt acts, and that there is wholly lacking in this case any proof of any *treason* against the United States of America.

Treason requires betrayal of one's country into the hands of the enemy.

Cramer v. United States, 325 U. S. 1.

Treason requires adhering to the enemy, giving them both aid and comfort, neither of which was established.

It thus requires knowledge on the part of the foreign government of the traitorous design, which was entirely absent in this case.

Undoubtedly one cannot be convicted of treason without having performed an act that is traitorous. It must be such an act as, when coupled with evidence of the accused's owing of allegiance to the United States, and a traitorous intent, would warrant the submission of the case to the jury. (*Cramer v. United States*, 325, U. S. 1.) None of the alleged overt acts found by the jury can survive this simple test.

The evidence is further insufficient in this: (1) There is no proof of the specific intent to betray the United States, the first essential element of the crime of treason. (2) There is no proof of giving "aid and comfort" to the enemy—strengthening Japan or weakening the United States in its war effort. (3) There was no proof by two witnesses to each of the whole overt act found.

Tomoya Kawakita, was at the time and under the setting the *enemy itself*. (*In re Territo*, 156 F. 2d 142.) He therefore could neither "adhere" nor give aid or comfort. Nor was Japan, as a nation, in the broad sense in which treason is generally understood, either aided or comforted. The overt acts found neither helped nor strengthened Japan toward winning the war, nor weakened the United States toward losing it.

It is conceded, and the court instructed the jury that he was a Japanese citizen. As such he owed allegiance to

Japan. While in that country it was total allegiance. Therefore, he could in no wise be guilty of treason.

Carlisle v. United States, 16 Wall. 147;

Ex parte Quirin, 317 U. S. 1;

Yamashita v. United States, 327 U. S. 1;

In re Territo (C. C. A. 9), 150 F. 2d 142.

None of the acts, singly or collectively, could be deemed treasonous. None of the Evidence Amounted to the dignity of the high crime of treason. It was merely an attempt to “get” another “Jap” who had been on the other side in the war, and was now living in the United States. Upon his discovery in the United States “Treason” was born as a means of retaliation in the mind of war veterans—one of whom wanted to kill Kawakita on seeing him in this country, because the veteran could not eat a nut or smoke a cigaret while working as a prisoner of war in Japan.

A.

The Burden of Proof Was on the Government to Prove Actual Existing Citizenship in the United States and Actual Duty of Allegiance to the United States at the Time. Two Direct Witnesses Necessary to Prove American Citizenship.

The constitutional requirement of two witnesses is essential to establish treason. Two direct witnesses were necessary to prove that Kawakita was, during the period mentioned in the indictment, actually an American citizen, then owing allegiance to the United States and as such committed overt acts of treason, or delivery of the United States to its enemies.

No such witnesses were produced.

We are not referring here to the matter of Kawakita's original American citizenship by birth and by reason of the operation of the Fourteenth Amendment. That we conceded by stipulation and conceded in the trial. What we did not concede nor admit was that he was an American citizen at the time of these alleged occurrences, nor that he owed at that time an allegiance to the United States. That burden rested upon the Government in order to establish its case. That burden had to be met by two direct witnesses having proof of conduct or matters which would overcome the presumption of expatriation or actual expatriation. Such proof is entirely lacking.

The constitutional expression of "two witnesses to the overt acts" means two witnesses to the overt act *of treason*, which necessarily would include as an element that the accused is actually a citizen of the United States, an essential ingredient of the crime, and actually then *owing allegiance* to the United States at the time.

As essential elements of the treasonable act in this case is necessarily the element of actual, existing American citizenship, and actual, existing duty of allegiance. There must be two direct witnesses to prove this element as of the time of the alleged act. These elements must be proved beyond a reasonable doubt by the Government.

Cramer v. United States, 325 U. S. 1;

Lilienthal v. United States, 97 U. S. 237, 272, 24 L. Ed. 904;

Miller v. United States, 155 U. S. 438;

Davis v. United States, 160 U. S. 469;

Green & Co. v. United States, 74 F. 2d 6.

The whole of the overt act must be proved by two witnesses.

Robinson v. United States, 259 Fed. 685;

Cramer v. United States, 325 U. S. 1;

Haupt v. United States, 330 U. S. 631, 90 L. Ed. 1145.

In this case the question of citizenship and a present existing duty of allegiance to the United States are inseparable from the overt acts, since the overt act must be in furtherance of treason and without the actual existing citizenship in the United States and a duty of allegiance to it being established no overt act is sufficient.

The Government sought to shift this burden to the defendant, by merely proving the defendant's original birth in the United States. On this they rested their entire case regarding his existing American citizenship.. But there is no presumption of continuing citizenship or duty of allegiance to the United States in the setting of this defendant. The presumption is to the contrary as we shall hereinafter set out.

Even if it be contended that actual existing citizenship in the United States and a present existing allegiance to it do not have to be proved by *two* witnesses, they must still be *proved* beyond a reasonable doubt by evidence. This is entirely absent. The proof is to the contrary. The undisputed evidence is that Kawakita resided in Japan for five years, that he had no American passport, that he was a Japanese citizen, that he was working in a Japanese defense plant area as an interpreter under the military authorities of Japan, that he traveled on a Japanese passport to China, that he had expatriated himself by his own

voluntary act in electing Japanese nationality, and that all his acts and conduct reaffirmed an existing allegiance to Japan, and that he then owed a then present duty of allegiance as a citizen of Japan to the government of Japan.

Therefore the Government Failed to Meet the Burden of Proof Beyond a Reasonable Doubt to Establish the Citizenship of Kawakita as Being an Actual American Citizen During the Period Covered by the Indictment, to-Wit, From August, 1944 to August 25, 1945, Owing Allegiance to the United States During This Period.

It was conceded throughout the trial that the defendant could not be guilty of treason if he was not an American citizen owing allegiance to the United States. Therefore, at the outset of its case, the most essential burden of the Government was to prove beyond a reasonable doubt that Kawakita was, during the period mentioned, an American citizen and not either a presumptive non-citizen or an actual expatriate. Also that he had a duty of allegiance to the United States. This it failed to do.

In *Lilienthal v. United States*, 97 U. S. 237, 272, 24 L. Ed. 904, the court said:

“In criminal cases the true rule is that the burden of proof never shifts; that in all cases, before a conviction can be had, the jury must be satisfied from the evidence, beyond a reasonable doubt of the affirmative of the issue presented in the accusation, that, the defendant is guilty in the manner and form as charged in the indictment. *Comm. v. McKie*, 1 Gray 64; *Com. v. York*, 9 Metc. 125; *Com. v. Webster*, 5 Cush. 305; *Com. v. Eddy*, 7 Gray 584; *Com. v. Wright*, Ben & H. L. Cr. Cas. 399.

Text writers of the highest authority state that there is a distinction between civil and criminal cases in respect to the degree of quantum of evidence necessary to justify the jury in finding their verdict. In civil cases their duty is to weigh the evidence carefully, and to find for the party in whose favor it preponderates; but in criminal trials the party accused is entitled to the legal presumption in favor of innocence, which in doubtful cases, is always sufficient to turn the scale in his favor. 3 Greenl. Ev., 8th ed., sec. 29; 1 Taylor, Ev., 6th ed., 372."

And see:

Brinegan v. United States, 328 U. S. 160, 173, 93 L. Ed. 1879, 1889.

In both August, 1944 and throughout the period to August 25, 1945, Kawakita was covered with two presumptions—one of them was that being a dual-citizen the Congress of the United States had presumptively expatriated him under the Nationality Act of 1940, Section 801, subparagraph (a), (b), (d), (e) and (f). He was also covered with the presumption of innocence.

What was then the effect of the presumptions? They covered the entire period charged in the indictment, to-wit, from August, 1944 until August 25, 1945.

A presumption is evidence which the jury are bound to follow and remains such until or unless it is overcome.⁶ In a criminal case, the Government's proof must be beyond a reasonable doubt.

It was incumbent upon the Government to prove beyond a reasonable doubt prior to the close of the Government's

⁶Section 1961, Code of Civil Procedure of California.

case that the presumption of expatriation had been overcome during the time of the period covered by the indictment.

One may rely upon a presumption for his total defense. Thus, one may rely on the presumption of innocence, and not take the witness stand.

Fifth Amendment U. S. Constitution ;

Bruno v. United States, 308 U. S. 287.

One may also rely on the presumption of expatriation.

The indictment charged that Kawakita was *a citizen* of the United States at the time of the alleged occurrences, not a presumptively expatriated citizen. The statutory presumption and proof was that *he was not a citizen of the United States* at the time of the occurrences, he having *dual citizenship* and residing in the country of his other citizenship, and that by reason of his residence in Japan he was *presumptively expatriated*.

Not a single shred of evidence was offered as to conduct, circumstances, or other things during the period alleged in the indictment that showed Kawakita was then and in fact an actual citizen of the United States or had done anything to continue his citizenship, or was not presumptively expatriated. All of his conduct was to the contrary, which *sustained the presumption* of expatriation rather than overcame it.

He was drafted as a Japanese subject. [Exhibit No. 6-I.] He held a position as interpreter under the Japanese government in a military area. He responded to the draft without protestation or insistence that he being an American citizen he was therefore not liable to the draft. He

was drafted to the prisoner of war camp, a Japanese military area.

If the Government's contention is to be followed, the Government's own charges as well as proof in this case are that he *acted contrary to any claim of American citizenship* and under a belief that he was expatriated. The very acts charged in the indictment negative any claim to American citizenship. He selected a Japanese residence; his desire to have prisoners of war come up to their requirement to do the required amount of work and not sabotage the job or malingering on the job, we believe, would be contrary to any claim of American citizenship.

There is not a single act, thing, or statement in the entire record which would, or could, establish beyond a reasonable doubt, nor at all, any competent or substantial evidence to overcome the presumption of expatriation, during *this period of time*.

"Inferences arising from circumstances cannot be substituted for circumstances to prove guilt."

Gerson v. United States, 25 F. 2d 49.

There is not a single circumstance in the entire evidence regarding this period of time which could be sufficient to overcome the presumption of expatriation.*

*When a presumption exists and is not controverted by substantial evidence, the jury is bound to find in accordance with the presumption.

The Code of Civil Procedure of California gives as good definitions of "presumption" and its effect as exists anywhere. Section 1959 defines presumption as follows:

"A presumption is a deduction which the law expressly directs to be made from particular facts."

Therefore, since there is no other evidence controverting Kawakita's presumption of expatriation as to the actual time of its

See discussion on presumption in *Tot v. United States*, 319 U. S. 467, and cases therein cited.

The presumption contained in the Nationality Code carries with it the necessary thought or connotation that a dual citizen who remains in the country of one of his citizenships has in fact elected and preferred to give that country his loyalty and therefore is actually or presumptively expatriated. (U. S. C. Title 8, Sec. 801a.)

The Government relied in this case upon the fact that in December, 1945, after the war was over, and in February, 1946, the defendant made application to the American Consulate for permission to return to the United States and at that time merely satisfied the United States Consulate officer as an administrator that he then overcame the presumption of expatriation.

Such later act or finding by the United States Consulate officer did not remove the effect of the earlier presumption, nor did it change the facts or the burden of proof upon the part of the Government. In fact this testimony was wholly irrelevant, except for the possible purpose of showing how he came back to the United States, which,

occurrence, the jury was bound to find according to the presumption. This made him innocent of treason.

And, since a person is presumed to know the law, Kawakita must be presumed to have known that he was presumptively expatriated during this period of time; therefore he could not have any treasonable intent since treason is a crime of the mind, in which one intends to betray his own country.

That this thought was in the mind of the jury is evidenced by the fact that the jury asked the judge after it had been out six days for a definition of the word "betray."

too, was not relevant to the issue of whether he was presumptively or actually expatriated.

The United States Consulate found that he had *dual* citizenship. [Ex. 2D.]

This only was a determination by an administrative officer of the state department that he overcame the presumption of expatriation *as of that date and his passport so distinctly states*. (Nationality Regulation 315.9.) It did not have the effect of overcoming the presumption of expatriation during the period covered by the indictment.

We submit, therefore, that this first and most important element was not proved by the Government, namely that during the period of time covered by the indictment Kawa-kita was *an actual American citizen*, owing allegiance to the United States. Rather, the evidence proves affirmatively that he was presumptively or actually expatriated and that he so conducted himself in accordance with that presumption, and as a Japanese citizen, residing in Japan, owing allegiance to Japan. And since he owed 100% allegiance to Japan under his dual citizenship while he was residing in that country it is respectfully submitted that he could under none of the circumstances herein enumerated have been guilty of treason.

B.

The Failure of Proof.

1. The indictment charges, and apparently recognizes, in paragraph I that there are two separate elements relating to citizenship necessary to establish the offense:

(1) That the accused is a *citizen* of the United States, and

(2) That he is a *person owing allegiance* to the United States.

It is appellant's position that one may be a dual citizen under recognized international law and our own decisions and not owe allegiance to a country in which he is not residing and whose protection he does not have and from which by its own laws, he is presumptively expatriated from its citizenship. The indictment charges in the conjunctive that:

"Tomoya Kawakita, the defendant herein, was born at Calexico, California, on September 26, 1921 and he has been at all times herein mentioned, and now is, a citizen of the United States of America *and* a person *owing allegiance to the United States of America.*" (Emphasis ours.)

It is the position of the appellant: (1) that Kawakita being a dual citizen, residing in Japan, was a citizen of Japan *owing allegiance to Japan* during such residence and that he was *presumptively expatriated as a citizen of the United States* and therefore, at the time that his American citizenship was presumptively lost, that he was *not* "a person owing allegiance to the United States of America" (2) Since our State Department recognized dual citizenship, throughout the entire period, in its treaty and

other relationships with Japan and other countries where dual citizenship exists, and since by Statute such a dual citizen is *presumptively expatriated after six months residence in the other country*, that is, that he is presumptively a noncitizen of the United States, there was a failure of proof that Kawakita was during all times mentioned herein, either a citizen or that he was "a person *owing allegiance* to the United States of America." (3) And, the Court having instructed the jury, and the Government having conceded that the defendant was a *citizen* of Japan during all times mentioned herein, the charge of treason could therefore not lie, since during that residence in Japan, he owed one hundred per cent allegiance to Japan, as a citizen of that country and none to the United States which had presumptively expatriated him.

In re Territo, 156 F. 2d 142 (9th Circuit);

Ex Parte Quirin, 317 U. S. 1, 87 L. Ed. 3;

Juragua Iron Company v. United States, 212 U. S. 297;

Carlisle v. United States, 16 Wall. 147.

Perkins v. Elg, 307 U. S. 325;

Savorgnan v. United States, 94 L. Ed. (Adv.) 203.

It is, further, the position of the appellant that by the laws of the United States he was presumptively expatriated and therefore was presumptively a *noncitizen* of the United States during the entire period of time mentioned herein. It was by operation of law.

This presumption, when overcome, is only overcome as of the date of overcoming it.

Section 402 Nationality Code U. S. C., Title 8, Sec. 802;

Section 315.9 Nationality Regulations.

It is further the position of the appellant that by his acts and conduct in Japan he was actually expatriated by operation of the Nationality Act of 1940, having Japanese citizenship, and having reaffirmed his allegiance to Japan, having served in a military area under the armed forces of Japan, and having held a post under the government of Japan.³ We will elaborate later under the heading "the Citizenship of Appellant."

* * * * *

2. Paragraph II of the Indictment charged that "during the times referred to herein, the work and services of prisoners of war who were members of the Armed Forces of the United States, and who were imprisoned at Camp Oeyama were used and utilized," etc.

³The Government of the United States admitted Kawakita's Japanese citizenship during the trial. The Government recognized and therefore stipulated that the defendant had so-called dual citizenship. Such a recognition and stipulation are acceptance on the part of the Government, of the defense that the defendant was a Japanese citizen and as a necessary corollary that he therefore owed total allegiance to Japan during the period specified in the indictment. Under such circumstances, the Government cannot prosecute the defendant by reason of the Doctrine of Estoppel.

It was prerequisite to the Government case for the Government to prove: (1) that the defendant was not a Japanese owing total allegiance to Japan during said period; and that he was still an American whose citizenship the United States Government had not presumptively or actually expatriated. Proving that he did not renounce his American citizenship is not enough under the circumstances. As the court said in his instruction to the jury, an American citizen cannot owe allegiance to more than one country at any given time. If the defendant were a Japanese owing allegiance to Japan at any time during said period, then and in that event he could not be an American owing allegiance to the United States during the period.

Tomoya Kawakita was a Japanese citizen during the period specified in the indictment.

The trial court ruled several times during the trial that Tomoya Kawakita could not obtain the Japanese nationality because he was

The prisoners of war were not members of the armed forces but were members of the disarmed forces of the United States. Once inducted into the labor battalion after their capture by the Japanese Government, they were disarmed and were no longer members of the armed forces of the United States and were then prisoners of war in the control of the country having them. (See discussion in *In re Territo* (9th Circuit) (*supra*) 156 F. 2d 142.

* * * * *

3. Paragraph III of the Indictment charges "the defendant Tomoya Kawakita, at and near the said Camp Oeyama in Japan, at said open pit or mine and smelter in Japan, *continuously and at all times from August 8, 1944 up to and including August 24, 1945, being a citizen of the*

a Japanese from his birth under the Japanese law. It was stipulated that Tomoya Kawakita's parents were born in Japan, and by reason thereof have always been Japanese nationals or subjects owing allegiance to Japan, and that the defendant himself, by reason of his Japanese parentage, was from birth a Japanese national or subject owing allegiance to Japan under the law of Japan.

The court's Jury Instruction No. 11-E (1) reads as follows:

"It is stipulated that the defendant's parents were born in Japan, and by reason thereof have always been Japanese nationals or subjects owing allegiance to Japan."

"According to the law of Japan, *the defendant himself, by reason of his Japanese parentage, was from birth a Japanese national or subject owing allegiance to Japan.*" (Emphasis ours.)

The defendant, Tomoya Kawakita, was in Japan to which he owed allegiance during the period specified in the indictment.

The defendant was drafted to work in a munition factory and had been employed under jurisdiction of the Japanese military government during all times mentioned in the indictment.

The defendant himself believed that he was a Japanese owing allegiance to Japan during all times mentioned in the indictment. (See his testimony.)

United States and a person owing allegiance to the United States, in violation of said duty of allegiance," etc.

The indictment charged a continuous conduct of treason from August, 1944 until August 25, 1945. Since the jury found as to only eight of the overt acts, there was a variance between the pleadings and the proof of *continuous* treason, and the effect of the verdict was actually a disagreement by the jury as to the continuous character of the treason charged in the indictment. Again, the Government charged in its indictment that Kawakita was (1) a *citizen* of the United States and (2) a person *owing allegiance* to the United States, and (3) in acting in violation of said duty of allegiance. He, at that time, was presumptively expatriated, therefore a noncitizen of the United States. The proof showed he was a resident of Japan, a citizen of Japan, and owed 100% loyalty to the Government of Japan and therefore owed *no duty of allegiance* to the United States.

* * * * *

4. The indictment continues that "he did knowingly, intentionally, wilfully, traitorously and treasonably adhere to the enemies of the United States." It is the position of the appellant that he was a part of the enemy, he did not adhere to them and his acts were not knowingly, intentionally or wilfully done, but in the performance of his duty to the Government of Japan where he was then residing.

The evidence showed, without contradiction, that he thought that he was a Japanese subject; the Government of the United States is estopped because the Statutes told

him so; the regulations of our State Department told him so, and he was drafted for service in Japan and therefore was not acting knowingly, intentionally, or wilfully or traitorously or treasonably.

* * * * *

5. Paragraph IV of the indictment charges the aforesaid adherence of said defendant, Tomoya Kawakita, and giving of aid and comfort by him to Japan during the period aforesaid “consisted of serving as interpreter and foreman at the said prisoner of war camp, and at said open pit or mine and smelter, and in said capacity as interpreter and foreman of *compelling members* of the armed forces of the United States, who were then and there held by the Japanese Government as prisoners of war, *to perform labor* at said open pit or mine and smelter.”

The uncontradicted evidence shows that the defendant was drafted by the Japanese Government as an *interpreter* by the Japanese Government and was working at the said prisoner of war camp at Oeyama under such draft; that prisoners of war were there by operation of treaty, statute and regulation, and that the defendant had nothing to do with their being in the prisoner of war camp; that they were required to perform the labor assigned to them by the Japanese Government, and therefore that he was not *compelling them to perform labor at said open pit or mine and smelter*, but that such compulsion was by operation of International Law, Treaty arrangement with Japan and the United States through the exchange of telegrams and op-

eration of law. That there were no *armed forces* as prisoners of war—they were *disarmed* forces, disarmed by conquest of Japan, and were a labor battalion within the power of Japan. [See exchanges of telegrams attached to Exhibit CU.]

* * * * *

6. The indictment further continues, “and of *directing* and assisting the Japanese Military Forces having charge of the prisoners of war at said Camp Oeyama in the imposition of discipline and punishment on said members of the Armed Forces of the United States.” It was conceded in the trial that Kawakita did not direct the military forces, that Japanese military forces were in charge of the camp and they did all the directing, including threats of death to anyone who did not carry out their orders, and of themselves imposing summary punishment on prisoners of war who were guilty of theft, conspiracies to disobey the military authorities, theft of scarce and rationed foods, and destruction of government property, and that the summary (although severe punishment imposed) was the only punishment given to them—at the *direction of the military forces* and not at the direction of the defendant.

It was further conceded by the Government that the other persons involved were not members of the armed forces of the United States but were disarmed forces in captivity as a labor battalion.

It is the position of the appellant that, in this setting, there could be no treason.

* * * * *

7. The balance of the charge contained in paragraph IV, regarding the imposition of discipline and punishment

on such disarmed forces of the United States, might have constituted war crimes if they occurred but did not constitute treason.

The indictment further alleges that the aforesaid activities of Kawakita, would, tended to, and did assist the Japanese Government to utilize members of the *armed forces* of the United States, and the proof showed that they were *disarmed labor battalions* in the control of the Japanese Government, then a nation, pursuant to International Law and the use of these members of the disarmed forces was by operation of International Law and Treaties and not by reason of anything that Kawakita did or could have done.

* * * * *

8. The overt acts charged and found by the jury were eight in number—each of them alleged acts directed toward a prisoner of war, which the indictment erroneously calls “A member of the armed forces of the United States.” The proof was that each of the men was a disarmed member of a labor battalion, and not then and there a member of the armed forces of the United States.

None of these overt acts spring even remotely from or in aid and comfort and contact with the Government of Japan.

As to the overt acts, the jury found on eight of the overt acts, to-wit: Act (a), (b), (c), (d), (g), (i), (j) and (k) as having occurred. These acts at no time showed any intent to betray the United States nor were they in furtherance of betrayal.

* * * * *

9. The language of the indictment attempts to justify and excuse the crimes of the prisoners of war against the Japanese Government and in violation of the regulations of the prisoner of war camp. Each of the punishments alleged to have occurred at the direction of the military authorities was for violation of serious infractions of Japanese law and Japanese Military Regulation, and could have called for punishment up to death for conspiracy to violate such laws and regulations.

At all times mentioned in the indictment, Japan was a Nation with its own Sovereignty and its own laws. It had conquered and disarmed and imprisoned the men in the prisoner of war camp at Oeyama, and Japan had, shortly after the outset of the war, entered into binding agreements through the Swiss Government with the United States to maintain prisoner of war camps in accordance with the terms and provisions of the Hague Treaty. It, also, had laws for punishment for damage to government property; for theft of rationed foods, and for the maintenance of prisoner of war camps.

Pursuant to its own laws, prisoner of war camps were maintained, controlled and operated by the Military authority. The camp at Oeyama was in charge of a Military Commander, Lt. Hazama and two Sergeants.

The defendant was drafted by the Japanese Government in his job at Camp Oeyama. [Exhibit AB-I.]

Thirteen overt acts, all within the confines of Oeyama Camp or mine, were submitted to the jury. The jury found against the defendant on eight of them.

* * * * *

10. Of the eight overt acts found by the jury against the defendant: Five were punishment acts in which the military authorities of Japan were imposing summary punishments for stealing scarce and rationed foods, for breaking into the storehouse and committing burglary, for cutting up and destroying government property (blankets), and for returning from work earlier than scheduled. Another overt act was allegedly for not moving an injured man from the place of his injury to the camp for a period of a few hours. Another overt act was kicking a man "to compel him to greater exertion," when he was not exerting himself at all. And, the other overt act was in causing a prisoner of war to carry two buckets of paint instead of one bucket of paint—all in Japan at a time when it was a nation at war with the United States, and with whom there were treaty arrangements for the government of prisoners of war.

It was shown in the trial that these overt acts of punishment were directed and carried out by the Military Authorities, and that the defendant was subject to their direction and command under threat of death. Nowhere throughout the trial was it shown how these acts gave any "aid or comfort" to the government of Japan.

Sergeant Montgomery, a counter-intelligence officer of the United States, who himself from time to time slapped American prisoners of war for stealing, was in charge of the American prisoners of war in the camp. No charge of treason was ever lodged against him. He was a government witness in this case. [R. 227-37; 318.]

11. Immediately after the surrender of Japan, the American forces who were then prisoners took over the camp and the defendant was subject to their orders and commands. He assisted them throughout the entire period and until their departure. They used him as their principal interpreter. Had he been guilty of treason, they were required by law to have revealed the fact and court-martialed him or else they themselves were guilty of *misprision of treason*. (Title 18, Section 3, U. S. Codes 1946 Edition.) No prosecution occurred in Japan, although the defendant repeatedly reported to the Military Authorities subsequent to his departure and while awaiting his American transportation, and also to the American Consulate, which gave him a clearance and overcame (in 1946) the presumption of expatriation, as of June, 1946, which had theretofore covered and cloaked the defendant. Such administrative decision in 1946 did not overcome the statutory presumption cloaking the defendant at all times herein.

* * * * *

12. The Government of the United States, by the terms of the Nationality Act of 1940 told Kawakita that he was presumptively expatriated—that is, that he was a non-citizen—during this period of time and, therefore, told him that he presumptively owed no allegiance to the Government of the United States. The State Department Bulletin and Regulation 315.9 also told Kawakita that the political policy of the United States was not to afford protection to dual citizens residing in the country of their

other citizenship, and that they owed paramount allegiance to that Government and not the Government of the United States. It is the position of the appellant that under no circumstances herein set out could Kawakita be guilty of treason for allegiance to Japan and that the Government of the United States is estopped by law and by its regulations from prosecution under the circumstances herein.

It is further the position of appellant that there was no proof of any intent to betray the United States and that the overt acts were trivial and inconsequential in their setting and did not and could not give aid and comfort to the Government of Japan.

Our appeal is divided into substantive questions and procedural questions.

The substantive questions deal, first, with the citizenship question and second with the insufficiency of the overt acts in their setting to constitute treason as a matter of fact or of law.

The Setting Shows No Treason.

To use the words of the *Cramer* case, we must look at the setting, first of all, in which the acts occurred. As said in *Cramer v. United States*, 325 U. S. 1:

“The very minimum function of an overt act must perform in a treason prosecution is that it show sufficient action by the accused, in its setting, to sustain a finding that the accused actually gave aid and comfort to the enemy.”

The Setting.

The setting of the Kawakita case was a prisoner of war camp and a mine connected with that prisoner of war camp in Japan. Kawakita, a citizen of Japan, was there by virtue of Japanese law and was presumptively, if not actually, expatriated from the United States. The prisoners were there by virtue of International Law, a part of the Supreme Law of the Land, Article I, Section 8, Constitution of the United States; *Ex Parte Quirin*, 317 U. S. 1. And, they were all subject to the Laws of Japan regarding theft and other crimes, and the rules and regulations of prisoners of war camps in Japan pursuant to International Law and International Treaties. [Defendant's Exhibit CU.]

The prisoners of war were all a labor battalion; they were within the power and control of the conquering government and the men were all disarmed laborers receiving the privileges of prisoners of war by a then conquering nation. They were legal slaves permitted to be such under International Law and the laws of war. They were impotent as warriors.

In this setting the acts complained of could not be treason.

In re Territo, 156 F. 2d 142;

Cramer v. United States, 325 U. S. 1;

Chandler v. United States, 171 F. 2d 921.

Also see *Prisoners of War a Study and Development of International Law* by William E. F. Flourny—a copy of which has been filed by the Appellant with the Clerk of the Court and lodged as an Exhibit.

While Japan was not a signatory to the Hague Convention, by an exchange of telegrams between the United States, Japan and the Swiss Government, acting as intermediaries, binding agreements were made between the United States and Japan as to the powers of each and the care and custody of prisoners of war. These are binding commitments and under it the Japanese government, therefore, had control of these labor battalions. [See Exhibits CU, CW.]

We have set these forth in the appendix to our brief under Statutes, Laws and Regulations.

Therefore the alleged acts and transactions in a prisoner of war camp, in a foreign country with complete sovereignty, affords no basis for a charge of treason.

The supreme law of the United States embraces the law of nations International Law, and Treaties, Laws of the Fighting Nations, and local rules and regulations of those nations in time of war.

Article I, Section 8 of the Constitution of the United States;

Article I, Section 7, Clause 3, Constitution of the United States;

Article IV, Section 2, Clause 3, Constitution of the United States;

Ex Parte Quirin, 317 U. S. 1, 87 L. Ed. 3;

Treaty of the Hague;

Japanese Rules and Regulations for Prisoners of War.

After World War II commenced, there was an exchange of agreement between the State Department of the United States and Japan through the Swiss government which the

State Department holds had the force of law. These documents are in evidence as Defendant's Exhibit No. CU, CW. Under the terms of this agreement between the United States and Japan, observance of the Hague Convention was to be had by both parties. Hence, all American soldiers who were in Camp Oeyama under that treaty constituted a non-combatant labor battalion. The men were required to work but receive wages for their work. They were under International Law and, under the treaty, subject to all the rules and regulations of the camp and all of the discipline of the camp. They received pay in accordance with their status and rank and rating. [Testimony of Sergeant Montgomery R. 219.] Their pay was ten sen or fifteen sen. They were required to do the work and were subject to all of the discipline which their failure to comply with the rules and regulations of the camp entailed.⁸ [And see testimony of Dr. LeMoyne Bleich.]

The kind of discipline that was enforced was for non-performance of the required quota of work, or for stealing and violating the laws governing the camp and the country

⁸Sergeant Montgomery testified [R. 219 *et seq.*]:

"Q. Now, you and the other prisons of war formed a labor battalion, is that correct? A. Well, I don't know whether you would call it battalion or not. The whole thing was a labor group.

Q. And you were in receipt of wages and the other men who were working there?

* * * * *

The Witness: 15 yen a day for n.c.o.'s., and 10 sen—sen rather than 15 yen a day for n.c.o.'s., and 10 sen a day for privates.

The Court: By n.c.o. you mean what?

The Witness: Non-commissioned officers." [R. 220.]

and thus, even depriving their countrymen and fellow prisoners of war of essential food which they stole, did not convert the case into a treason case.

See:

In re Territo, 156 F. 2d 142 (9th Circuit).

Assume that a Japanese American was placed under our draft laws in one of the Japanese relocation centers which we maintained during the war and that during one of the riots (which took place at some of the relocation centers) that the Japanese American enforced discipline in the riotous camp; that he struck some of the Japanese, because they were recalcitrant, because they failed to clean up or because they stole rationed food—could it be said that such a Japanese American, if we had lost the war instead of won it, would be guilty of treason to Japan by reason of such conduct? We respectfully assert that he would not.

In the setting of this case, Japan then had complete sovereignty. The soldiers had been disarmed elsewhere by the Japanese Government and were merely turned into a work battalion, as provided by International Law and by our treaties with Japan. Under those circumstances, the mere compelling of these men to work for their food and to be punished by the rules and regulations that governed their prisonership could not in this setting constitute treason under any circumstances.

Under its provisions and under the laws of Japan and the regulations thereof, the setting in a prisoner of war camp and prisoner of war employment place could not be a setting for the crime of treason, for any act or acts done to such prisoners of war for failing to do their re-

quired quota of work, for failing to obey the laws of the country in committing acts of theft or depredation, or for failing to render any medical assistance for a period of five hours.

In *Winthrop's Military Law and Precedents, Second Edition*, U. S. War Department Document No. 1001, page 778, it is stated:

"The Law of War as Specially Applicable to Enemies in Arms.

The conduct of war between civilized belligerents is required by modern usage to be governed by certain general principles—such as the following:

. . . VI. That each belligerent shall duly punish all persons within his lines who may be guilty of violations of the laws of war."

And, on page 792, it is stated:

"4. *Discipline.* Prisoners of war must conform to the laws, regulations and orders in force in the enemy's army, or country, and applicable to them, must require consideration with good faith, not concealing their true names, rank, etc., for the insubordinate or contumacious conduct must expect disciplinary measures."

In its setting, in a prisoner of war camp, all of these acts were of a local nature and were within the power of the conquering country, which had extended the benefit of a prisoner of war camp to the defeated enemy rather than kill them, as was done in other days.

The setting, alone, we respectfully submit, is not one that permits of the charge of treason. Nothing charged to have been done within such a prisoner of war camp

could give aid or comfort, could strengthen the enemy, or weaken the United States.

Under the facts of this case, also, the defendant was drafted by the Government of Japan to work in this setting and was compelled by the Government to do the work that he was doing in this setting, and as such he was obliged to be employed here. Such being the case, it could not give aid and comfort to the Government of Japan, nor could it aid their war effort or weaken our own.

Exclusive jurisdiction of the offenses upon which the conviction rests was in the Japanese army, see the Japanese military authorities, under the Hague Conventions of 1899, 1907 and the Geneva Convention of 1929, the Constitution of the United States Article I, Section 8, Hague Convention 1899, 2 Malloy U. S. Treaties and Conventions, pp. 2042, 2049, Hague Convention 1907, 2 Malloy, supra, pp. 2259, 2282, Geneva Convention of 1929, 4 Malloy, supra, pp. 5224, 5237, U. S. list of treaties in force December 31, 1941, p. 39. [See Defendant's Exhibits CU and CS.]

For a full discussion of the status of prisoners of war, see *In re Territto*, 156 F. 2d 142; Hale International Law, Chapter 3, Chapter 2, Section 131; Winthrop's Second Edition, Volume 2, point 2, Section 1228; Oppenheim's International Law, Sixth Edition; Floury, Prisoners of War; Hall International Law, pages 490, 497; Hydes' International Law, Section 675.

Treaties are in evidence as Defendant's Exhibits CU, CW. See also R. 3910-3985.

Japanese Laws, Rules and Regulations of Prisoners of War are also in evidence as Exhibit CS.

“Prisoners of War Punishment Law, Law No. 41, 9 March, 1943,” provides in Article 5 as follows:

“Persons who resist or fail to obey any order of any persons supervising, guarding or escorting prisoners of war, shall be liable so the penalty of death or penal servitude or imprisonment for life or for a period not less than one year.

Persons who in combination with other persons have committed any of the offenses specified in the preceding paragraph shall be liable, in respect of the ringleader, to the penalty of death or penal servitude or imprisonment for life, and, in respect of the other parties, to the penalty of death, penal servitude or imprisonment for life or for a period not less than 2 years.”

And provides in Article 6 as follows:

“Persons who have insulted any of the persons supervising, guarding, or escorting prisoners of war in his presence or in an open manner shall be liable to penal servitude or imprisonment not less than five years.” [Exhibit CS, pp. 77-78.]

These would apply to American prisoners who, contrary to orders, stole, ate forbidden foods, cut up government blankets, refused to work and individually or in combination resisted or failed to obey orders of the persons supervising them.

The treaties are all alike in providing that:

“Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the state in whose hands they have fallen.” [Exhibit CT.]

As a member of the family of nations, each state is entitled to claim rights under International Law, and simultaneously is obligated to fulfill its duties under the law.

Floury, "Prisoners of Wars," page 7.

The detaining state has: within the limit set by International Law, the right to utilize the labor of prisoners of war and to discipline them for insubordination. The exercise of this right may be beneficial both to the prisoner and to the detaining state. The prisoners may derive benefit from having an active occupation and the detaining state the benefit from decreased problems of discipline and increased labor resources.

See:

U. S. War Department Digest of Opinions of the Judge Advocate General of the Army, 1912-1930, with 1931 Supplement (1932, p. 1097, Sec. 22124).

For comment upon the place of the labor of prisoners in the economic structure of a state, see *Journal de Droit International* (Crunet 1916, page 1695).

³In ancient times, the Romans in times used their prisoners for festive purposes, a practice in which the Greeks did not engage. Prisoners of the Greeks were killed when they became an encumbrance, or when their slaughter would terrify the enemy and glorify the conqueror. In the later years, when enslavement became general, the law stepped between the Master and the Slave and forbade the killing of the latter without reason.

Vattel (Emmerich de Vattel *Le droit des gens*) Russo, says that when the enemy surrenders his life must be spared.

And, since prisoners of war must eat and be provided for, International Law has recognized that as long as a man is permitted by manner and customary International Law to live it is the right of the government to require prisoners below the rank of officers to work for the benefit of the detaining state, of private persons or organizations, or of the population in general.

For an excellent discussion on the status of prisoners of war, see this Court's opinion in *In re Territo*, 156 F. 2d 142.

In *In re Yamashita*, 327 U. S. 1, 72, provisions of the treaties between the United States and Japan were declared to be in force. (See also *Ex Parte Quirin*, 317 U. S. 1, 34; *Floury—Prisoners of War*, p. 23.)

In the treaties, the United States at the Hague, 1899 and 1907, it was stated:

“Nothing contained in this Convention shall be construed as to require the United States of America from its traditional policy of not intruding upon, interfering with, or entangling itself in the internal administration of any foreign state.”

The administration of the Japanese Prisoners of War Camps certainly were, at that time, within the internal administration of Japan. They were governed by their own laws, rules and regulations. Under the agreement between the State Department, therefore, we would have nothing to do with that. Articles of Treaties under the Sixth Article of the Constitution are placed upon the same footing and made of like obligation with other Constitutional provisions of the United States and with Acts of Congress. If an effect can be given to both it will. If inconsistent, the latest one will be controlling, providing the treaty provisions are self executing. (*Whitney v. Robertson*, 124 U. S. 190, 194.)

The provisions of the treaty obligations between the United States and Japan are self executing and are last in point of time. (See *Rosborough v. Rossell*, 150 F. 2d 809, 812, 813; *United States v. Reid*, 73 F. 2d 153 (C. C. A. 9).)

Various kinds of breaches of camp discipline occurred within the camp, according to the allegations of the indictment and the evidence at the trial. Failure to meet the requirement of the Commanding Officer as to work was a breach of the camp discipline—the Commandant's orders.

The other acts were penal offenses in their nature—burglary, theft, stealing scarce and rationed foods (which would deprive other prisoners of war of their share of food), cutting up and destroying government property. (See Geneva Convention 1929; Hague Convention 1907; Hague Convention 1899; Exhibits in evidence.)

The Government of American prisoners of war in a Japanese prisoner of war camp in Japan was purely the function and power within the Government of Japan. Any act by a Japanese citizen within it did not and could not constitute treason or the violation of any laws of the United States at the time.

The act of Congress, Title 18 U. S. Code, Sec. 1, should therefore not be given extra territorial effect in a foreign prisoner of war camp. To provide the same as treason in the case of a dual citizen residing in enemy territory, as in the case of those residing in the United States, would be unreasonable and create a bad precedent. In fact, it is a two-edged sword.

Assume that the United States had lost the war instead of won it; would the Japanese interpreters in American Prisoners of War Camps be subject to punishment as

traitors to Japan? We must remember that we also had riot in our own Japanese Internment Camps and that interpreters were called upon to aid the officers in charge in the disciplining and interpreting of discipline in those camps. Under the construction attempted to be placed in this case, these men would be guilty of treason to Japan, although residing in the United States, because they happened to be dual citizens of both countries. The Treason Statute should not be so construed.

It has always been recognized that, by reason of the obligation of allegiance to the country of residence, there might be in such a case "adherence" which was not criminal.

The Venus, 8 Cranch 253;

McConnell v. Hector, 3 Bos. 6 Fuller's Reports, 113, 114;

Hale: Pleas of the Crown, pp. 164-165.

Indeed, prisoners of war may volunteer for work "for a variety of purposes designed directly to aid the captor in the prosecution of the war, enabling it to release potential fighters from non-military tasks of which the proper performance might be, nevertheless, a military necessity."

3 Hyde: *International Law*, p. 1851;

War Department: *Rules of Land Warfare*, Sections 100-104;

Geneva Convention of 1929, Art. 27.

In this setting then, there was not and could not be treason by the defendant.

The Citizenship of the Appellant.

As we said under the heading "The Failure of Proof" it was conceded, at all times, by the government, and the court so instructed the jury, that the defendant was at all times a *citizen of Japan* during the entire time he was residing in Japan. [Clk. Tr. p. 310.] While born in the United States, he was presumptively expatriated from his American citizenship by the terms of the Nationality Act of 1940 and his continued residence in Japan for five years.

We repeat, in such a setting, the defendant owed total loyalty to Japan and he could not, therefore, be guilty of treason even though he might have a contingent citizenship in the United States of America. He was, under the Nationality Act of 1940, at all times presumptively expatriated from the citizenship of United States because of his residence in Japan. (See Nationality Act Sections 401 and 402; U. S. C. 801 and 802; Nationality Code Regulation 315.9.)

Being a citizen of Japan and presumptively expatriated from his citizenship of the United States, there was, at that time, no obligation of loyalty to the United States in any manner, shape or form, and therefore in this setting he could not be guilty of adhering to the enemy—he was the *enemy*, and he could not give them aid and comfort. We will treat of this more fully later on.

See the following cases:

Carlisle v. United States, 16 Wall. 147;

United States v. Fricke, 259 Fed. 673, 682;

The Benito Estinger, 176 U. S. 568, 571;

The Rapid, 8 Cranch. 155, 160-161;

The Eliza, 4 Dall. 37, 40.

The Venus, 8 Cranch. 253;

The Frances, 8 Cranch. 335;

The Marian Susan, 1 Wheat. 46;

Mrs. Alexander's Cotton, 2 Wall. 404;

Miller v. United States, 11 Wall. 268;

Fore v. Tearget, 97 U. S. 594;

Juragua Iron Company v. United States, 212 U. S. 297.

The Government of the United States recognized dual citizenship at all times. Its political branch, the State Department, removed its protection from such dual citizens while residing in the other country. The policy of such political branch of the government is binding on the courts in the absence of a showing that it is wrong.

United States v. Johnson, 124 U. S. 236;

Reid v. United States, 73 F. 2d 153 (C. C. A. 9);

Mexico v. Hoffman, 324 U. S. 30, 38, 42.

The government is therefore estopped from claiming allegiance from one whom it ceases to protect and to whom it states that he owes his paramount allegiance to the other country where he is residing and whose citizenship he has.

Dual Citizenship of Appellant.

It is undisputed that the defendant had dual nationality, that is to say, that by reason of the fact that his father and mother were born in Japan, and were at all times Japanese citizens and subjects, he was a Japanese citizen; and by reason of his own birth in the United States of America, he was an American citizen.

Dual nationality was prior to and at all times recognized by the Supreme Court of the United States.

As stated by the Supreme Court of the United States:

“The municipal law determines how citizenship may be acquired,” and

“It follows that persons may have a dual nationality.”

Perkins, Secretary of Labor, et al. v. Elg, 307 U. S. 325, 329 (1939).

The classic example of dual nationality is that of a person like the defendant, born in the United States of nationals of Japan, who acquired at birth the nationality of the United States by reason of his place of birth, *jure soli*, and acquired the nationality of his parents by virtue of their nationality in Japan, *jure sanguinis*⁵ in Defendant's

⁵In *Perkins v. Elg*, 307 U. S. 325, 329, the Court said:

“The classic example of dual nationality is that of a person born in one country of nationals of another country who acquire at birth the nationality of the former by reason of the place of birth, *jure soli*, and that of the latter by virtue of the nationality of the parents, *jure sanguinis*.”

Exhibit No. DR the State Department Bulletin as follows:

The State Department has said:

"20. Dual nationality.

Persons born in the United States of unnaturalized parents acquire American citizenship under American law and as a general rule also acquire the nationality of the country of which their parents are nationals. Often foreign nationality is retained notwithstanding the subsequent naturalization as citizens of the United States of their parents during the minority of the person born in the United States. A person possessing the nationality of both the United States and a foreign country, who habitually resides in the territory of such foreign country and who is in fact most closely connected with that country, should not expect to receive the protection of this Government while he is residing in such country, and it is not the practice of the Department to make representations in his behalf with a view to his release from the performance of military or other obligations to the foreign country."

It is undisputed in the evidence in this case and the trial court so instructed the jury that the defendant had Japanese nationality. It is also undisputed he was residing in Japan. Under such circumstances, he owed 100% allegiance to Japan and could not be guilty of treason to the United States.

This government recognized that many persons are born citizens or subjects of two countries under their respective laws. And, in respect to their obligations when residing in one of country of their citizenship, this country has held that in respect to calls of military duty, or other obligations of *allegiance*, to the place of their residence, the country of their residence has the paramount claim to loyalty and therefore necessarily the total allegiance of such person.

The State Department has forewarned all citizens of dual nationality that this country will not interfere with

the claims of the other government for military service, or any other service in time of war.

See Department of State Bulletin [DR for identification], Section 20, on the subject of dual nationality.

In re Territo, 156 F. 2d 145;

Series of State Department Correspondence with Foreign Governments set out in Hackworth Digest of International Law, Volume 3, Page 352, Sec. 255 *et seq.*

See:

Perkins v. Elg, 307 U. S. 325.

Article II of the Inter-American Convention on the status of aliens, signed February 20, 1928, provides:

“Foreigners are subject, as are nationals, to local jurisdiction and laws, due consideration being given to the limitations expressed in conventions and treaties. 46 Stat. 2754; Four treaties, etc. (Trenwith, 1938, 4723.)”

And, *In re Territo*, 156 F. 2d 142 (C. C. A. 9), the court said, quoting *In re La Marrs Executor v. Brown*, 92 U. S. 187, 194, 23 L. Ed. 650:

“In war, all residents of enemy country are enemies.”

Whiting's War Power Under the Constitution, 340-342 says in part:

“A neutral, citizen of the United States, domiciled in the enemy country, not only in respect to his property, but also in his capacity to sue, is deemed as much an alien enemy as a person actually born under the allegiance and residing within the dominions of the hostile nation.”

And again the case quotes *In Jaragua Iron Company v. United States*, 212 U. S. 297, 63 L. Ed. 520, and the court in the course of its opinion said:

“Under the recognized rules governing the conduct of war between two nations, Cuba being a part of same, with enemy sentry and all persons, whatever their nationality, who resided there, were, pending such war, to be deemed enemies of the United States and of all its people.”

This case also quotes Mr. Floury in his richly authenticated book “Prisoners of War,” page 30, to the fact that Irishmen though then subjects of Great Britain who had taken the oath of allegiance to the South African Republics during the Boer War were treated as prisoners of war. (See *Moyer v. Peabody*, 312 U. S. 78, 53 L. Ed. 410; *Streling v. Constance*, 287 U. S. 378, 77 L. Ed. 375.)

In *American Banana Co. v. United Fruit Company*, 213 U. S. 347, 356, it is stated that:

“The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where it is done.”

And this country held in the case of a British subject that while he was in the United States he owed local allegiance to the United States of America.

Carlisle v. United States, 83 U. S. (16 Wall.) 147, 21 L. Ed. 426.

The term citizenship and nationality refer to the status of the individual in his relationship to the state and are often used synonymously.

The word "nationality" has a broader meaning than the word "citizenship." In *Gloria v. United States*, 231 U. S. 9, 22, 23:

"Citizenship is membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other."

And the solicitor for the Department of State in an opinion to that department said that:

"Allegiance is a political obligation between sovereign and citizen of a reciprocal character, involving obedience on the part of the citizen and protection on the part of the sovereign."

A Person Holding Dual Nationality Cannot Be Guilty of Treason When He Exercises 100% Allegiance to the Country of One of His Nationalities Wherein He Is Residing.

This is consistently shown by the attitude of our own State Department which recognizes dual nationality and recognizes the obligation of a citizen of the United States and of another country while residing in that country to enter into its armed forces when called upon to do so.

In re Territo, 156 F. 2d 142 (C. C. A. 9);

Perkins v. Elg, 307 U. S. 325.

Savorgnan v. United States, 94 L. Ed. (Adv.) 203.

Territo, on August 25, 1945, filed an action, while being held in the United States as a prisoner of war, to declare himself to be a United States national. He had been taken prisoner while serving in the Italian forces on the field

of battle, by the United States Army in Sicily, on July 23, 1943. Pursuant to the Geneva convention, he was brought to the United States and held in custody as a prisoner of war and required to work in labor in the United States. This court held that this had been the country of his birth; nevertheless it denied his release on *habeas corpus*, although he was an American in America. Being under the control of the military of the United States, the court left him where he was and he went back to Italy.

The State Department's ruling on its rights and obligations to persons of dual citizenship has been set out in various bulletins to the American Consulate. In these various bulletins, it has warned persons holding dual citizenship that:

“A person possessing two or more nationalities who habitually resides in one of the countries whose nationality he possesses and who in fact is most closely connected with that country cannot look to protection from the other country.”

In *Carlisle v. United States*, 83 U. S. 426, 16 Wall. 147, the Court said:

“‘Every foreign born residing in a country owes to that country allegiance and obedience to its laws so long as he remains in it, as a duty upon him by the mere fact of his residence, and that temporary protection which he enjoys, and is as much bound to obey its laws as native subjects or citizens. This is the universal understanding in all civilized states, and nowhere a more established doctrine than in this country.’ And again: ‘Independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the tak-

ing of any oath of allegiance or of renouncing any former allegiance, it is well known that, by the public law, an alien or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason or other crimes as a native-born subject might be, unless his case is varied by some treaty stipulation.' 6 Web. Works, 526.

The same doctrine is stated in Hale's Pleas of the Crown, Vol. I, ch. 10, East's Crown Law, Vol. 1, ch. 2, §4, and Foster's Discourse upon High Treason, §2, p. 185, all of which are treatises of approved merit.

Such being the established doctrine, the claimants here were amenable to the laws of the United States prescribing punishment for treason and for giving aid and comfort to the rebellion. They were, as domiciled aliens in the country prior to the rebellion, under the obligation of fidelity and obedience to the government of the United States. They subsequently took their lot with the insurgents, and would be subject like them to punishment under the laws they violated, but for the Proclamation of the President of December 25, 1868."

The Assistant Secretary of State, Olds, wrote to Minister MacMurray, No. 202, April 19, 1926, M. S. Dept. of State, file 393.1121 to Chu Shea-Wai, as follows:

"It is a generally recognized rule, which may be regarded as a rule of international law, that when a person who was born with dual nationality is residing in either of the countries of which he is a national, that country has a right to assert

its claim to him without any interference by the other, unless perhaps such person having reached the age of majority has clearly elected the nationality of the other country and is only temporarily residing in the country asserting the claim. Even in the latter case, it cannot be asserted with any degree of confidence that the country in which the person is found has no right to assert its claim to his nationality and allegiance as it may not recognize the principal's election. It is not believed that extra territoriality affects this rule . . . It seems clear that Chu Shea-Wai, although he is a citizen of the United States under the law of this country, because of the fact that he was born in this country, is also a citizen of China under the law of that country, because his father was of Chinese nationality, and it does not appear that the existence of extra territorial jurisdiction in China interferes in any way with the right of China to claim this individual as a Chinese citizen."

The State Department has consistently refused to interfere where foreign governments have claimed the duty of dual citizens to perform duties of allegiance to the country of their residence. A minor born in the United States of French parents was held to be liable in the performance "of duties of allegiance in the country in which he actually lived, if by the law of that country he is considered as a citizen and if his parents have not renounced allegiance to that the country of his birth affords the child no protection during his minority." The State Department held, therefore, that:

"The young gentleman in your memorandum is liable to be drafted in the French Army. Opinion of

the Office of the Solicitor for the Department of State, February 23, 1910." (1910 Solicitors Opinion 1, page 297.)

Frank Arnold Godfrey was born in Texas in 1893, of British parents, and taken by them to New Zealand in November, 1901. The Department of State said that it could not interfere to relieve him from the performance of duties and the performance of duties as a British subject, while he remained within British jurisdiction. The Chief Clerk Carr to Consul General Prickett No. 78, May 5, 1910, M. C. Department of State File 10154-65.

William McCormack, born in the United States in 1875 of Irish parents, was taken to Ireland when four months old. He returned to the United States in 1894 and remained ten years, at the end of which time he went to Dublin and enlisted in the British army, taking an oath of allegiance to Great Britain. The Department of State rejected his request for assistance in obtaining a discharge from the British Army.

We come then to the obligations flowing from the relation of State to its nationals. These are reciprocal in character. This principle has been amply stated by the Supreme Court of the United States in *Luria v. United States*, 231 U. S. 9-28. wherein it says:

"Citizenship is membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other."

Allegiance, as the term is generally used, means fidelity or fidelity to the government of which the person is either a citizen or subject.

Murray v. The Charming Betsy, 6 U. S. (2d Cranch), 64, 120, 2 L. Ed. 208.

Mr. Story says *allegiance* is:

“Nothing more than the tie or duty or obedience of the subject to the sovereign under whose protection he is.”

Wong Kim Ark, 169 U. S. 649, 42 L. Ed. 890.

“Allegiance is that duty which is due from every citizen to the state, a political duty binding on him who enjoys the protection of the commonwealth, to render it a service and fealty to the federal government. It is that duty which is reciprocal to the right of protection, arising from the political relations between the government and the citizens.”

Wallace v. Harmstad, 44 Pall. (8 Wright 492, 501.)

In *Carlisle v. United States*, 83 U. S. (16 Wall. 147, 154), 21 L. Ed. 426, the court said:

“By allegiance is meant the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign in return for the protection he receives. It may be an absolute and permanent obligation, or it may be a qualified and temporary one. The citizen or subject owes an absolute and permanent allegiance to his

government or sovereign, or at least until, by some open and distinct act, he renounces it and becomes a citizen or subject of another government or another sovereign. The alien, whilst domiciled in the country, owes a local and temporary allegiance which continues during the period of his residence.”

This allegiance is continuous during his residence. The court did not say *partial* allegiance, or *dual* allegiance, but allegiance means total allegiance. (See *United States v. Kuhn*, 49 Fed. Supp. 407, 414.)

The State Department recognizes this in its bulletins on dual nationality.

In the decision of *Oyama v. California*, 332 U. S. 633, at 666, is the doctrine that one residing in the country, receiving the benefits of that country, owes loyalty and the desire to work for the welfare of that state while there. This is not a divided loyalty but a total one.

Thus it may be seen that a citizen owes loyalty to the country of which he is a citizen and in which he lives. That is 100% loyalty—not 50%.

Title 18, Section 1 uses the expression, “Whoever, *owing allegiance* to the United States.” This expression supposes that some citizens do not owe allegiance to the United States. Dual citizens would fall in this class—just as Americans in foreign countries drafted or inducted into such foreign army could not “owe allegiance” to the United States.

In *In Re Territo*, holding that one can be an alien enemy notwithstanding American citizenship, imposes two questions which must be distinguished: (1) Whether there is a status created by dual nationality which occupies a sort of middle ground between citizenship and non-citizenship, which places the person occupying that status beyond the scope of the treason statutes, when in the country of one of its citizenships at war with the other; and (2) Whether the status of dual nationality and the conduct of one occupying that status are significant because they have some bearing on *state of mind*, *i. e.*, whether treasonable intent is present. A third, although not parallel problem is the one which arises from the presumption of expatriation by residence abroad for a period of six months or more created by Section 802 of Title 8. This presumptively expatriates or suspends American citizenship during that period.

The second important significance of the period of existence of the presumption prior to rebuttal is its bearing upon state of mind. The presumption of knowledge of the law, if applicable to the non-resident, would seem to require that the conduct of the non-resident during the existence of the presumption is to be considered in the light of the fact that the non-resident is presumed to have acted in the belief that, under the law, he was presumed to be an expatriate and not a citizen owing allegiance to the United States.

With respect to question (1) above, the inquiry can be stated more simply: Can an *enemy alien* holding a foreign

and presumptively or actually expatriated American citizenship be guilty of treason?

The answer is obviously "no."

If Kawakita was only presumptively expatriated he had no duty to the United States during his presumptively expatriated citizenship after the outbreak of the war and after the passport had expired. This government had, in fact, incorporated in its notice on passport regulations that those of dual citizenship could not expect protection from the United States if called into service of the Government where they were residing.

Since this Government could not extend the protection of citizenship and, furthermore, it did not, it ceased to have any reciprocal obligations of allegiance during such a period of time. Having itself suspended its protection, it could not look for allegiance from those whose only return for allegiance was the protection of the Government.

The Court below misconstrued the effect of the Fourteenth Amendment to the Constitution upon the petitioner. It is true that the Fourteenth Amendment conferred citizenship upon him by reason of his birth in the United States. It had a constitution and statutory effect giving him the great blessings of citizenship in the United States so long as it was in a position to return those blessings—personal and protective while he was living in the United States and by way of passport when he went abroad. But all these had ceased. It was never the intention of our country to inflict the claim of citizen-

ship permanently and for all times. This was the claim of the totalitarian governments. On the contrary, the Congress in 1868 passed what is now Title 800, Section 8, the Nationality Code, giving citizens an inalienable right to expatriate themselves.

It was shortly thereafter our own Attorney General in our own State Department notified foreign governments that those who had taken on citizenship in the United States could not be compelled or forced into military service, or called back to military duty in the countries which held that they had no right of expatriation. (See *Perkins Secretary of Labor, et al. v. Elg*, 307 U. S. 325, and 99 F. 2d 408.)

Thus, Kawakita living in Japan under a Japanese residence, the presumption of expatriation having applied to him rulings of the State Department, that in case of dual nationality the State Department would not interfere with the local authorities, was subject to the draft of that country, and having been drafted for the services which he performed, he owed 100% allegiance to Japan in return for its citizenship and its protection, and therefore could not be punished for the crime of treason as he then and there did not owe any allegiance to the United States of America.

The words "adhering to," giving "aid and comfort" to the enemy, as contained in the Constitutional definition of treason and also charged in the indictment [Rep. Tr.. pp. 27-28] admits that the person is not of the nationality or

citizenship of the country to which he “adheres” and to which he gives aid and comfort.

Under the doctrine of dual-nationality, Kawakita could not *adhere* to Japan if he was a Japanese citizen. This was conceded. He could not give aid and comfort *to* the enemy, as he was in fact a part *of* the enemy, and as one of its citizen owed it one hundred percent allegiance.

In re Territo (9th Cir.), 156 F. 2d 142, and cases cited therein.

Mr. Chief Justice Marshall held in *United States v. Burr*, 25 Fed. Case No. 14693 and in *Ex parte Bollman*, 4 Cranch. 75, 8 U. S. 554 (1807), that a strict interpretation of the constitutional provision was called for by American experience in the formation of its own nationality. The Chief Justice said:

“To prevent the possibility of those calamities which result from the extension of treason to offenses of minor importance, that great fundamental law which defines and limits the various departments of our government has given a rule on the subject both to the legislature and the courts of America, which neither can be permitted to transcend . . . It is, therefore, more safe as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition should receive such punishment as the legislature in its wisdom may provide.” (Emphasis ours.)

As stated by the Chief Justice in *United States v. Burr*, 25 Fed. Case No. 14693, the court said:

“The whole treason laid in this indictment is the levying of war in Blennerhassett’s island, and the whole question to which the inquiry of the court is now directed is, whether the prisoner was legally present at that fact . . . but the counsel for the prosecution seem themselves not to have sufficiently adverted to this clear principle, that though the overt act may not be itself the treason, it is the sole act of that treason which can produce conviction.”

Here the question to which inquiry is directed is whether the defendant, although legally present in the prisoner of war camp as a drafted employee, working under the command and orders of the Japanese Government as an admittedly Japanese citizen, could in relation to the labor draft of American prisoners of war who were totally disarmed be guilty of treason where the sole acts alleged committed were alleged committed by him in his capacity as a Japanese national, drafted as such and regarded as such by the Government of Japan, and where such punishments as were being carried out upon the prisoners of war were for violation of the laws of Japan and the rules and regulations of the camp, issued pursuant to a treaty arrangement between the United States and Japan.

Treaties of the United States are the Supreme Law of the land. (Article VI, United States Constitution.)

Reid v. United States, 73 F. 2d 153 (C. C. A. 9).

An exchange of letters between the United States and Japan made the terms of the Geneva Convention the supreme law of the land under the doctrine of *mutatis mutandis*. [See Exhibits CT, CU and CV, in evidence.]

In both treaty series 539 [CV in evidence] and treaty series 846 [CU in evidence] and [CS in evidence], Article 628, pages 25, 26 and 27, give the terms under which the enemy government may intern prisoners of war and put them to work under labor battalions and states that such prisoners of war are in the power of the government seizing them, and provides further that prisoners of war must obey all of the rules and regulations of the enemy government in any prisoner of war camp, and are subject to all of the punishments of such foreign government that they might inflict on their own soldiers.

Thus, under International Law, the Law of Nations, the Hague Treaty and in the setting of the prisoner of war camp, who were then under International Law in the power of the hostile government, there could be under no circumstances in this case any treason committed.

Article VI, United States Constitution;

Ex parte Quirin, 317 U. S. 1, 87 L. Ed. 3;

Cramer v. United States, 325 U. S. 1;

In re Territo, 156 F. 2d 142;

Treaty Series 846 and Treaty Series 539, Rules and Regulations for the Government of Japanese Camps [Deft. Ex. CS].

II.

The Trial Court Erred in Failing to Dismiss the Indictment or Enter Judgment of Acquittal for Failure to State an Offense Against the Laws of the United States.

The trial court erred in failing to grant the motion to dismiss the indictment at the beginning of the case, at the close of the Government's case, and at the close of the entire case and to grant judgments of acquittal made therein.

We have already argued and presented law to show (1) That a dual citizen residing in the country of one of his citizenship has paramount allegiance to that government, and that this is inconsistent with any duty of allegiance to the United States. That is to say he owes 100% allegiance to that government while residing there, and in time of war is considered an alien enemy. (*Ex parte Quirin*, 317 U. S. 1, 87 L. Ed. 3; *In re Territo*, 156 F. 2d 142; *Carlisle v. United States*, 16 Wall. 147; *Perkins v. Elg*, 307 U. S. 325.)

Where a person has dual citizenship and the Statute and previous decisions have made it clear that this country recognizes such dual citizenship, and that he owed paramount allegiance to the country in which he resides he is under no necessity of guessing where his loyalty lies, or whether the treason statute in the former country applies to him. Under such a situation, his acts cannot be *wilfull* acts for he does not do any act with specific intent. He does the acts in good faith. Otherwise, the declarations of the State Department as to the paramount loyalty of a dual citizen would be a trap for his other country to prosecute him for treason. The policy of the State Department is binding on the courts. (*Reid v. United States*,

73 F. 2d 153 (C. C. A. 9); *Mexico v. Hoffman*, 324 U. S. 30.) This is not permissible. Our government is estopped from prosecution under such circumstances.

A citizen does not have to guess at the plain meaning of Government Statutes and Regulations and State Department Bulletins and interpretations which are issued for his benefit, and to expect that at a later time they will be changed by judicial construction. In this sense, therefore, there was no proof of wilfullness. (See *Screws v. United States*, 325 U. S. 104; *M. Kraus & Bros. v. U. S.*, 327 U. S. 614, 90 L. Ed. 894.)

In the United States, a Japanese subject born in the United States, having dual citizenship, was required to have 100% obligation to the United States; and if they failed to respond to selective service, even if they denounced their American Citizenship, they were liable to prosecution. The same policy was therefore properly applicable in Japan to Japanese citizens of American birth.

Okamoto v. United States, 152 F. 2d 905;

Takeguma v. United States, 156 F. 2d 437;

Fujii v. United States, 148 F. 2d 298.

As said in *Carlisle v. United States*, 16 Wall. 147:

“Being both a citizen and resident of Japan, he owed 100% allegiance to Japan, and did he disobey the Japanese he would be guilty of treason regardless of citizenship.”

Carlisle v. United States, 16 Wall. 147;

Radich v. Hutchins, 95 U. S. 210;

Dejager v. Attorney General of Natou (A. C. 326);

Leonhard v. Eley, 151 F. 2d 409 (C. E. A. 10);

Ex parte Quirin, 317 U. S. 1, 87 L. Ed. 3.

While residing in enemy territory, he was an alien enemy for all purposes. (*In re Territo*, 156 F. 2d 142; *Ex parte Quirin*, 317 U. S. 1; *Okamoto v. United States*, 152 F. 2d 905; *Takeguma v. United States*, 156 F. 2d 437; *Fujii v. United States*, 148 F. 2d 298; The War of 1812, The Venus, 8 Cranch 253; The Frances, 8 Cranch 335; The Mary & Susan, 1 Wheat. 46; Civil War, Mrs. Alexander's Cotton, 2 Wall. 404; *Miller v. United States*, 11 Wall. 268; *Ford v. Surget*, 97 U. S. 594; *Spanish American War, Juragua R. & Co. v. United States*, 212 U. S. 297; *Herrera v. United States*, 222 U. S. 558; *World War I, Kahn v. Garvan*, 263 Fed. 909 (S. V. N. Y.); *Taber v. United States*, 81 Court of Claims 142; Certiorari denied 296 U. S. 96; Present War, *In re Territo*, 156 F. 2d 142; *Ex parte Quirin*, 317 U. S. 1, 87 L. Ed. 3.)

See *LaMars Executor v. Brown*, 92 U. S. 187, 23 L. Ed. 650, wherein the Court said:

“In war, all residents of enemy country are enemies.”

Guiding's Powers under the Constitution, 340-342:

“A neutral or a citizen of the United States.”

If Kawakita had been drafted into the fighting forces of Japan instead of merely into a prisoner of war camp and had actually gone out in the field of battle and shot and killed our own soldiers, he would not have been subject to prosecution for treason, even though he gave, in such circumstances, actual aid and comfort to the enemy, and aided their forces in war.

We ourselves have recognized the obligation to answer to the American draft by compelling Japanese

—even those who had renounced their American citizenship—to join our American armed forces in fighting against Japan. That was a duty which they owed in return for their residence and protection of this country while living in this country.

Okemoto v. United States, 152 F. 2d 905;

Takeguma v. United States, 156 F. 2d 437.

We, therefore, contend that Kawakita, under his dual citizenship, was Japanese, owing all allegiance to Japan during his residence in that country, and could not be guilty of treason to the United States.

If Kawakita were in the United States he would have been drafted to fight against Japan. He might have been assigned to one of our own prisoner of war camps where we also had riots and disobedience. If we had lost the war, instead of won it, would he then be guilty of treason to Japan? This would indeed be a dangerous, unfair and wrong precedent, and not sound law.

When any fact will support two inferences, one of innocence and the other of guilt, it does not prove guilt.

Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 339;

Manley v. Georgia, 279 U. S. 1, 7;

The Bothnea, 2 Wheat. 169, 177.

The defendant was covered by an American statutory presumption of expatriation.

Kawakita's Japanese Citizenship.

There was total protection given by the Government of Japan to Kawakita; its armies were fighting and he was receiving its food and sustenance and his liberty. By the laws of the United States he was presumptively expatriated. There was no protection being given to him by the Government of the United States, nor was it obligated to do so, for by statute he was presumptively expatriated. The duty of allegiance to the United States, in this setting, and under these circumstances, had ceased. There were no mutual obligations, the first essentials of citizenship and allegiance.

In this setting, his duty of allegiance was solely to the Government of Japan. One cannot serve two Gods or two rulers or two masters. The law had fixed the defendant's loyalty to Japan, and presumptively expatriated or suspended his allegiance to the United States.

The trial court instructed the jury that: "According to the law of Japan, the defendant himself, by reason of his Japanese parentage was from birth a Japanese national or subject, owing allegiance to Japan." [R. 5504.] By the terms of the Nationality Act of 1940 (Sec. 402 of the Nationality Act, 8 U. S. C. Sec. 802) the defendant had Japanese citizenship, and, was employed in a position as interpreter with the military government of Japan. Therefore, his duty of allegiance to the United States was suspended by reason of the statutory presumption of expatriation during the entire period of time covered by the indictment.

From early history long residence in a foreign country has been considered presumption of expatriation. California terminates its citizenship upon change of residence.

The United States Nationality Act of 1940 provided that a person with dual citizenship, residing in the country of his other citizenship for six months or longer, accepting or performing the duties of any office, post or employment *under* the government, is *presumptively expatriated* from the United States. By State Department Bulletins, also, he was told that he could not expect protection from the United States while residing in the country of his other citizenship, and that he owed such other country paramount allegiance.

A presumption is legal proof of a fact *unless and until* overcome. And a jury are bound to accept it. By statute and regulation the presumption, when and if overcome, is only overcome as of the date of such administrative finding and is not retroactive.

Such announced political policy on the part of the government is binding on the courts (*Reid v. United States*, 73 F. 2d 153; *Mexico v. Hoffman*, 324 U. S. 30, 38, 42; *Perkins v. Elg*, 307 U. S. 325) and estops the limited states from prosecuting one of its dual citizens presumptively expatriated and residing in the foreign country of its other citizenship.

If the court holds, as we feel it must, that Kawakita, as a dual citizen, residing in Japan, was presumptively expatriated from the United States he therefore could not be guilty of treason. We need not consider the next argument. However, if the court holds against these contentions we then further contend that:

Under Japanese law the defendant, Tomoya Kawakita, had actually expatriated himself and therefore could not be guilty of treason. Japan's recognition of

Kawakita's election was binding upon the United States.

The defendant, Tomoya Kawakita, was seventeen years old when he went to Japan. Although he had been born in the United States, both his father and his mother were Japanese citizens, and by reason of Japanese law he was by birth a Japanese subject born in the United States.

Cut off from his father's allowance, needing work which required him to be a Japanese National, Kawakita applied for such work after his graduation from the Japanese University. (See *Chandler v. United States*, 171 F. 2d 685.)

His American passport had expired and its renewal had long expired, and he had then been residing in Japan more than four years. Thus, in 1943, Kawakita was questioned by the police because he was registered as an "alien" holding American nationality. He was told by the police that he had to make an election as to whether he would be Japanese or American. He went home and talked to his uncle, who told him that he should elect to be Japanese and have his name entered on the family Koseki. Up to that time his name was not so entered.

He was then 21 years of age. He went with his uncle to the City Hall and had his name entered on the family Koseki. He affixed his seal on the registration and told the clerk he wanted to be recognized as a Japanese citizen. Thereafter he changed his address. The address was changed on the University registration cards. [See Exhibit 4.] His address, when he applied for employment was given as the Japanese address.

The Japanese police removed his name from the alien register and recognized that that procedure was the formal

election of Japanese nationality. (See Title 801, U. S. C., Subd. (a).) He thereafter went about freely from city to city in Japan. He went to China for the company on a *Japanese passport*. Mr. Satoru Mori, the President of the Company, said he would not have been hired had he not been a Japanese National. Fujizawa, another interpreter, had to get a special permit from the army while he was taking on Japanese nationality. The Attorney General of Japan, in his deposition, states the entry of Kawakita's name on the family register is a "reaffirmance of an allegiance that already exists."

Section 801 of the Nationality Code, paragraph (a), recognizes the right of election of a dual citizen who thereafter is deemed to have lost his American citizenship. (See Appendix G(a).)

It further provides that a person who is a national of the United States, whether by birth or naturalization, loses his nationality by:

(b) "Taking an oath or making an affirmation, or other formal declaration of allegiance to a foreign state."

Section 401(b), 54 Stat. 1169.

The acts of Kawakita were an election of Japanese nationality. It was recognized by Japan. His subsequent acts were certainly a *formal* declaration of allegiance to a foreign state before a Japanese state official. He went to the City Hall to the Registrar's Office and had his name entered in the family Koseki, put his seal on the matter, and did everything that that country required according to its law to declare his allegiance to Japan.

The Attorney General of Japan said it *reaffirmed* an allegiance that already exists. [Exhibit A.] And Japan recognized both the election and affirmation.

In this respect it therefore was no different than an American citizen who already owes allegiance to the United States reaffirming his allegiance to the United States when he takes another oath to support and uphold the Constitution of the United States. (We hear much of loyalty oaths these days.) It is no different than an attorney takes, when he already is a citizen of the United States, when he is sworn in as an attorney at law or receives admission in another court. It is no different than a voter going down to the registrar of voter's office and *registering* to vote. He reaffirms his citizenship and declares his right to vote. When he went to China on a Japanese passport he again made formal declaration.

Japan's legal construction of allegiance to Japan is binding in this case. The testimony of Police Officer Sasaki [R. 3866, 3873] was that Kawakita's name was removed from the alien register at the police station. President Mori said he would not have hired Kawakita if his name was not in the clear on Japanese nationality and each day at Camp Oeyama he affirmed his allegiance to the Emperor. Thus, throughout the entire case it was recognized that Kawakita had Japanese nationality. The trial court even so instructed the jury but told them it did not make any difference whether he had Japanese nationality. It clung to the ancient totalitarian doctrine that once a citizen always a citizen, and that the United States could hold onto its subjects abroad, regardless of their election.

Section 800 of the Nationality Code recognizes the American's right to sever the obligation of citizenship, or expatriate himself and remove his right to protection in a foreign country.

Kawakita did not claim exemption from the draft or military service in Japan on account of his American nationality, nor did he claim any protection from the Government of the United States; nor did the Government of the United States offer any such person any protection.

He traveled under a Japanese passport, from the summer 1944 until Oct. 23, 1944. This was sufficient to place him under the protection of Japan.

Joyce v. Director of Public Prosecutions, 1946, A. C. 647;

Rex v. Joyce, 173 L. R. T. 377.

The defendant therefore expatriated himself by his election. There is no provision in Japanese law, any more than there is in American law, for a Japanese citizen to "naturalize" himself or "recitizenize" himself—if we may use that expression. He already is a citizen of Japan. This was conceded in the trial. How then may a citizen of Japan express his election to remain Japanese? By his voluntary acts and conduct and his intention.

U. S. C. Title 8, Sec. 807a;

United States v. Yasui, 48 Fed. Supp. 46.

Important things are set up in the Nationality Code which would indicate a clear election, such as voting in an election, joining the army of the enemy, taking an oath or making an affirmation, or other form of declaration of allegiance. These are not exclusive determinations. We contend that the construction which the Japanese Govern-

ment places upon the acts of its own citizens in the absence of a contrary showing is binding upon the United States as to what happened in Japan. It is the same as an Administrative determination of a fact.

Thus, Kawakita had his name entered in the family Koseki. This, according to the Attorney General of Japan, constituted a *reaffirmation* of his allegiance to Japan. It was the same as children born abroad of our own American citizens and declare their allegiance to the United States upon reaching majority; or, it is the same as a man being admitted to the practice of law, declaring to support the Constitution of the United States. It is a reaffirmation of an allegiance which already exists.

He changed his residence. After his name was entered into the family Koseki, the police department removed his name from the list of *aliens* and the Japanese construction of the act was that he was no longer an alien but a Japanese for all purposes, and that he could go about wherever he wished. These were contemporaneous construction by Japanese administrative officers that he had elected Japanese nationality. No Japanese law expert was placed on the stand by the Government to testify to the contrary. Kawakita was permitted to go to work in a defense area, in fact in a prisoner of war area, in which only Japanese could be permitted to go. He changed his address at the University, and his residence was thereafter always given as a Japanese residence. Japan gave him a Japanese passport to go to China, and regarded him as under its protection by reason of that fact.

These were all acts which clearly showed his intent to expatriate himself. (See excellent opinion of Judge Fee in *United States v. Yasui*, 48 Fed. Supp. 40.)

To restate:

Kawakita elected Japanese citizenship by his own voluntary acts and in various ways provided by the Nationality Act of 1940 and his election was expressed by his voluntary acts.

Thus, pursuant to Section 401 of the Nationality Code, 8 U. S. C. 801(a), he was the son of a Japanese National who had by his own voluntary act* failed to return within

*In the opinion in the *Ricketts* case (165 F. 2d 193), the court said:

"The provision does not undertake to specify what voluntary act or acts will amount to an expatriation. In that respect, the framers of the legislation seem to have been content to follow the not very precise verbiage of Chief Justice Hughes in *Perkins v. Elg*."

The language of Chief Justice Hughes in *Perkins v. Elg*, 83 L. Ed. at 1325, is as follows:

"To cause a loss of that citizenship in the absence of treaty or statute having that effect, there must be voluntary action and such action cannot be attributed to an infant whose removal to another country is beyond his control and who during minority is incapable of a binding choice."

And the court quoted from Secretary Sherman, as follows:

"If such a party having thus become a recognized citizen of the United States, takes up his abode once more in his original country, and applies to be restored to his former citizenship, the government of the last named country is authorized to receive him again as a citizen, on such conditions as the said Government may think proper (Treaty of 1869, Article III). Or he may by residence in the country of origin, without intent to return to the United States, be held to have renounced his American citizenship (Protocol, May 26, 1869). But this presumption, like all presumptions of intent, may be rebutted by proof. . . .

* * * * *

"That in the latter case the child was not deemed to have lost his American citizenship by virtue of the terms of the statute but might still with reasonable promptness on attaining majority manifest his election is shown by the views expressed in the instructions issued under date of November 24, 1923, by the Department of State to the American Diplomatic and

two years from the effective date of the act, and had taken up permanent residence in Japan, having changed his address and taken up permanent residence in Japan. (See *Attorney General v. Ricketts*, 165 F. 2d 193.) This must be deemed to have been a determination on Kawakita's part to discontinue his status as an American. [See

Consular Officers. These instructions dealt with the questions arising under the citizenship act of March 2, 1907, and cases of *dual nationality*. It was stated that it was deemed desirable 'to inform diplomatic and consular officers of the department's conclusions, for their guidance in handling individual cases.'"

Commenting on dual nationality the instructions said:

"The term 'dual nationality' needs exact appreciation. It refers to the fact that two States make equal claim to the allegiance of an individual at the same time. Thus, one State may claim his allegiance because of his birth within its territory, and the other because at the time of his birth in foreign territory his parents were its nationals. The laws of the United States purport to clothe persons with American citizenship by virtue of both principles."

And after referring to the Fourteenth Amendment and the Act of February 10, 1855 (10 Stat. at L. 604, Chap. 71, Sec. 1), Rev. Stats., Sec. 1993; 8 U. S. C. A., Sec. 6, the instructions continued:

"It thus becomes important to note how far these differing claims of American nationality are fairly operative with respect to persons living abroad, whether they were born abroad or were born in the United States of alien parents and taken during minority to reside in the territory of States to which the parents owed allegiance. It is logical that, while the child remains or resides in territory of the foreign State claiming him as a national, the United States *should respect its claim to allegiance*. The important point to observe is that the doctrine of dual allegiance ceases, in American contemplation, to be fully applicable after the child has reached adult years. Thereafter two States may in fact claim him as a national. Those claims are not, however, regarded as of equal merit, because one of the States may then justly assert that his relationship to itself as a national is, by reason of circumstances that have arisen, inconsistent with, and reasonably superior to, any claim of allegiance asserted by any other State. *Ordinarily the State in which the individual retains his residence after attaining his majority has the superior claim.*" (Italics ours.)

Government's Exhibits 4, 6I and 6T.] Section 401(a) provides:

“(a) . . . *Provided further*, That a person who has acquired foreign nationality through the naturalization of his parent or parents, and who at the same time is a citizen of the United States, shall, if abroad and he has not heretofore expatriated himself as an American citizen by his own voluntary act, be permitted within two years from the effective date of this Act to return to the United States and take up permanent residence therein, and it shall be thereafter deemed that he has elected to be an American citizen. Failure on the part of such person to so return and take up permanent residence in the United States during such period shall be deemed to be a determination on the part of such person to discontinue his status as an American citizen, and such person shall be forever estopped by such failure from thereafter claiming such American citizenship; or (54 Stat. 1168-1169; 8 U. S. C. 801).”

And since he was estopped by law from claiming American citizenship, the government is estopped from claiming him to be an American citizen for the purpose of a treason prosecution, after a war veteran who once couldn't eat a nut or smoke a cigaret in a prisoner war camp, wanted to kill him when he saw him in the United States.

Kawakita had also reaffirmed his allegiance to Japan by having his name entered in the Koseki, the family registry. Section 401(b), Title 8, U. S. C. 801 of the Nationality Act, provides as follows:

“BY OATH OR AFFIRMATION OR OTHER DECLARATION OF ALLEGIANCE TO A FOREIGN STATE.

“(b) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state; or (54 Stat. 1169; 8 U. S. C. 801).”

And, Yoshio Suzuki, the Attorney General of Japan stated in his deposition [Exhibit A] as follows:

“Q. State specifically if this is the form and manner, or one of the forms and manner, in which a Japanese son, born of a parent in the United States who was born in Japan, and who came to Japan in 1939 and desired to become a Japanese national, which would permit one to make affirmation or other formal declaration of allegiance to Japan. In other words, is a request to a one's parents or relatives to enter one's name in the family register in Japan, a formal declaration of allegiance to Japan, or a formal declaration that one from that time on is to be a Japanese national under the laws of Japan as of March 8, 1943? A. In Japan, all Japanese Nationals are duty bound to Japanese allegiance. This is also true of those Japanese Nationals who are born in foreign countries of Japanese parents. The registration into the Family Register is not necessarily a formal declaration of allegiance but merely an reaffirmation of an allegiance to Japan which already exists.”

To reaffirm is to affirm again. It was done in a public office before a public registrar. One reregistering for election reaffirms. One getting a bar certificate or a passport reaffirms an allegiance.

(c) Kawakita had also conformed with the requirements of Title 801, Section 401, Subdivision (c), which provides as follows:

“BY ENTERING OR SERVING IN THE ARMED FORCES
OF A FOREIGN STATE.

(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; or (54 Stat. 1169; 8 U. S. C. 801)."

While Kawakita was not actually in uniform, he served as part of the armed forces in Camp Oeyama. He was drafted by the government. He was assigned to a military area. One does not actually have to be in uniform to be in the armed forces. Our own army has many civilians with the status of being in the armed forces. Acting as an interpreter for the armed forces in a prisoner of war camp operated under army regulations is a part of the armed forces. If the enemy had captured him, he would have been treated as a prisoner of war. Art. 3 of the next Regulation of the treaty of the Hague, entitled Treaty Series, No. 846, signed at Geneva, July 27, 1929, provides in the footnote: "The armed forces of the belligerent parties may consist of combatants and noncombatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war." (Page 39, Treaty Series, No. 846.) (And see *In re Territo*, 156 F. 2d 142.)

(d) Kawakita also accepted and performed the duties of a post and employment under the Government of Japan, for which only Nationals of Japan were eligible, namely, employment in the military confines of Camp Oeyama where only Japanese Nationals were permitted to act. Kawakita was asked by Mr. Mori, the president of the company, and his other employers whether he was a Japanese National and it was conceded that he was a Japanese National. He was only eligible for such employment because he was a Japanese National and therefore

came within the specific provisions of Section 401, Subdivision (d) of Title 801, which provides as follows:

“BY ACCEPTING OR PERFORMING DUTIES UNDER A FOREIGN STATE.

(d) Accepting, or performing the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof for which only nationals of such states are eligible, or (54 Stat. 1169; 8 U. S. C. 801).”

In *United States v. Minoru Yasui*, 48 Fed. Supp. 40, at 54, it was said by Judge Fee:

“Under the Constitution of the United States, Amend. 14, Sec. 1, Yasui, by virtue of his birth in the territorial limits of the United States and notwithstanding the fact that his parents were alien Japanese incapable of naturalization in the United States, had conferred upon him the inestimable right to citizenship in the United States. By international law, however, he was also a citizen of Japan and subject of the Emperor of Japan. According to international law, also, he had, upon attaining majority but not before, the right of election as to whether he would accept citizenship in the United States or give his allegiance to the Emperor to whom he was bound by race, the nativity of his parents and the subtle nuances of traditional mores engrained in his race by centuries of social discipline.

While, therefore, Congress might have set up tests or presumptions whereby the initiation or continuance of the relationship of citizenship in persons who held the dual status during minority might have been tested, as it has done in case of naturalized citizens, or might have permitted segregation until evidence of

citizenship were produced, no such intention is apparent in the legislation.

This election is a mental act. The choice which exists in the mind of a person is exemplified by acts. The intention, however, to make an election can be discovered by a tribunal as can criminal intent, knowledge or any other mental state. Notwithstanding the expression of some liberal authorities, tender in times of peace to preserve civil rights, such a mental state may be found in a criminal case contrary to the sworn evidence, protestations and declarations of a defendant."

Although the case was reversed in the Supreme Court upon other grounds, the law as set out by Judge Fee is clear and applicable to this appellant.

The Character of the Overt Acts Themselves.

We challenge the sufficiency of the overt acts because they are colorless as to intent and because they are insufficient as a matter of law as a giving of aid and comfort to the enemy. The acts themselves, in relation to the charge and the setting, are trivial and common place.

As said in *Cramer v. United States*, 325 U. S. 1 at 35:

"But in this and some cases we have cited where the sufficiency of the overt acts have been challenged because they were colorless as to intent, we are persuaded the reason intent was left in question was that the acts were really indecisive as a giving of aid and comfort. When we deal with acts that are trivial and commonplace and hence are doubtful as to whether they gave aid and comfort to the enemy, we are most put to it to find in other evidence a treacherous intent."

And, as said in *United States v. Stephan*, 50 Fed. Supp. 738, 743, approved in *Stephan v. United States*, 133 F. 2d 87, cert. denied 319 U. S. 781:

“Our forefathers did not want Congress to be able to take spitting in somebody’s face or anything of that kind, as being treason so they tell the congress itself what it is.”

Let us look at each of the overt acts. We have set out in the appendix a complete summary with page references to each witness as to each overt act. We may say by preliminary that the government did not urge in the trial that intent to betray could be gathered from any of the overt acts. They attempted to prove intent to betray from separate evidence. To this we will advert later.

The Insufficiency of the Overt Acts.

Preliminary to taking up each of the eight overt acts, we may specify that none of the allegations in the indictment, or the proof offered in support of those allegations was definite and specific. The dates were vague, general and conflicting. Times and places were at variance and no substantial evidence was offered that the acts alleged could not have taken place more than once or twice, or were not of such a nature that they could or did not occur more than once.

If it be said that the time of trial was long removed from the alleged dates of the occurrences, then it is the Government which was lax in the matter of bringing the allegations and charges timely and it must bear the consequences. This is not a case where there was a discovery of an alleged offense long after its occurrence. If it occurred at all, it occurred while all of the Americans

were in the camp, and in a period when there were at least 45 American officers present, and one American captain, a doctor, was at all times in charge of the camp and received reports of any physical occurrences to any of the men. He kept a complete diary and medical records. None of them contain a single report regarding Kawakita.

In charge of the Americans, and as the Japanese called him "So Hanchō," was the American Spy, Chief Counter-Intelligence Officer, Sergeant Montgomery.

Winthrop's Military Law and Precedents, Second Edition (Army Document 1001), page 776, says:

"ARREST AND RESTRAINT OF PERSONS. The Laws of War authorize the arrest, trial and punishment of such of our own people as may become chargeable with relieving or communicating with the enemy, carrying on illicit trade or intercourse, or other violation of those laws. The liability and disposition of such offenders has already been in part considered under the 45th and 46th Articles of War, and will be further discussed in treating of the jurisdiction and powers of the MILITARY COMMISSION. The restraints which may be exercised over the citizen will also enter into the consideration of the subject of MARTIAL LAW." (*Winthrop's Military Law and Precedents, Second Edition, page 776.*)

If any of these acts occurred as alleged, they occurred prior to the Americans taking over the camp. Immediately after the Americans took over, Major Martin (American) was placed in charge of the camp. The American flag was raised and Sgt. Montgomery became the non-commissioned officer in charge. Discipline followed.

If treason had occurred, it was then the duty of the American officers and men to arrest the defendant immedi-

ately. In fact, Title 18, Section 3, makes anyone who fails to report treason immediately guilty of misprision of treason.

Even the Japanese officers in charge of the Camp were placed under arrest a short time after the termination of the camp for so-called war crimes. But not the defendant.

Kawakita not only was about the camp daily, after the Americans took over, but assisted the American officers throughout in locating food, taking their parties on excursions, and finally in helping them to entrain. This is not the badge of treason, and if he were guilty of treason, the doctors and men would not be slow to express their personal animosity toward him, rather than have him accompany them, set up their prophylactic station, and be selected as the favorite interpreter for the purposes of locating food, explaining to civilians whose homes had been hit by the dropping of packages and babies injured, giving apologies, etc., and all the other things that the defendant did.

And, significant indeed, is the fact that he went to work in Japan thereafter. He did not seek immediate return to the United States, but was at all times available to the Americans while in Japan.

It was not until four months afterwards that he sought the advice and information from the American Consulate as to the possible status of returning to the United States, to continue his education in this country. Significantly enough, his address was at all times known to the American Consulate and he was thoroughly investigated by the Counter-Intelligence Corps, which gave a favorable report to the American Consulate at the time.

He did not leave Japan until August, 1946. He reported constantly to the Eighth Army in Japan.

Surely, if he was guilty of treason at a specific time and date, it was the duty of the American officers and men, as well as the Counter-Intelligence Corps of the Army and the American Consulate to have brought those charges forthwith.

Therefore, the failure to bring the charges, if they had any logical basis, at a time when the facts could actually be established with certainty and definiteness by the direct testimony of two witnesses was the responsibility of the Government, which it failed to exercise.

We shall talk about this more under our heading on the "Denial to the defendant of his Constitutional rights of Speedy Trial."

Coming now, however, to the lack of proof of overt acts by the testimony of two witnesses, we start out with the basic principle announced in *United States v. Robinson*, 259 Fed. 685, that the overt acts must be established by direct evidence of two witnesses to the entire or whole overt act.

And see also:

Cramer v. United States, 325 U. S. 1.

OVERT ACT (a) was the Toland incident. This act was as follows:

"(a) Defendant TOMOYA KAWAKITA, on a date in May, 1945, the exact date of which is to the grand jury unknown, at the said smelter operated by the company near Camp Oeyama, did direct the work of Phillip D. Toland, a member of the armed forces of the United States who was then and there a prisoner

of war, to compel him to remove rock from the road-bed and track of a railroad used in the operation of said smelter, and did kick the said Phillip D. Toland to compel him to greater exertion in said work.”

The work was directed by the military authorities, not by Kawakita.

Toland himself said that the alleged occurrence was June, 1945. He was unable to specify the exact date, he said it occurred in June, 1945. He put a mark on the blackboard with a “T” on Plaintiff’s Exhibit 25, which was different than the mark put there by other witnesses, and it was an entirely different location. The other witnesses said that it occurred some time in May, 1945. None of them had any specific date or time, or exact specification, nor did any of them establish that it was done to compel Toland to *greater* exertion.* Toland was not exerting himself at all at the time, according to his own testimony. According to Dr. LeMoyne Bleich, M. D., the only officer in charge of the men, Toland was then assigned “light duty” on the garden party and was not working at the smelter. Dr. Bleich’s daily card record so shows. [R. 3409] and had been since April 21, 1945, thus contradicting all the dates of the other witnesses.

*Philip Daniel Toland, in his statement to the Intelligence Corps, made on November 16, 1945, shortly after he returned to the United States and within a few months after he left Camp Oeyama, described one incident that allegedly occurred on August 1, 1945, in the morning, when according to his statement:

“I was not marking time and he called me by number in Japanese.”

He said he was then ordered out in front of the whole group and struck with the left hand of the guard, whose right arm was paralyzed, and he did not know or remember the name of the guard. He in nowise mentioned Kawakita [See Exhibit AG], nor any other incident at the camp to which is testified in this case.

The requirement of two direct witnesses is: "Two direct witnesses to the same occurrence, or some part of the same occurrence." Can anyone say that all these witnesses saw the same incident at the same time and same place, and on the same date, or at all? Surely the testimony leaves much to be desired—in fact, it is entirely lacking in substantial proof of all of these required elements to be the direct testimony of two witnesses, as required by the Constitution.

Haupt v. United States, 330 U. S. 630.

The evidence as to Overt Act (a) showed that Phillip D. Toland was a prisoner of war and that his work was being supervised and directed by the military authorities of Japan. Lt. Hazama was in charge, not Kawakita. The amount, quantity and duties of Toland were outlined by the military authorities. [R. 4064.]

The next incident was the Grant incident, which is OVERT ACT (b), as follows:

"(b) Defendant TOMOYA KAWAKITA, during the latter part of April, 1945, the exact date of which is to the grand jury unknown, at said Camp Oeyama did direct and participate in the following inhuman and degrading punishment of one, J. C. Grant, a member of the armed forces of the United States who was then and there a prisoner of war at said Camp Oeyama; said J. C. Grant was knocked into the drain or cesspool of said camp by his Japanese guards and was repeatedly and violently struck and beaten by the defendant and the said Japanese guards as he attempted to get out of the pool, thereby sustaining injuries, shock and exposure."

We have set out in our appendix a summary of the testimony with page references of each of the witnesses to each of the overt acts found by the jury.

The testimony was uncertain as to the date, time and place of the incident. Grant himself had gone through an experience of this kind twice for stealing. He did not identify the defendant as one of those who participated.

The whole of the overt act was not proved. The evidence is uncontradicted that Kawakita did not *direct* the punishment of Grant, but that it was directed by Sargeant Ichiba and Akamatsu.

The indictment does not state that Grant was a thief—stealing and burglarizing a storehouse in Japan. While our sense of fellow feeling for Americans may rise up against the use against even a thief of this old “ducking stool” method—once used in the United States for punishing gossiping women who talked too much, nevertheless the proof is lacking that Kawakita *directed* any inhuman or degrading punishment of Grant, or that Kawakita knocked Grant into the drain or cesspool, or that Kawakita was responsible for Grant sustaining any injuries. Dr. Bleich, who was nearby at the time and advised Grant to move about in the pool, did not see Kawakita, and the evidence is entirely lacking by the testimony of two witnesses that this occurred, on a particular date or time, in April, 1945, or that it occurred only once. Grant was questioned after the war on war crimes and did not mention Kawakita in his statement. Furthermore, Grant received no other punishment, although for this type of burglary, even in this country, he might have been imprisoned at hard labor for four years—and, in Japan the Regulations

governing the prisoner of war camp called for as much punishment as death.

Furthermore, on March 1, 1945, Kawakita was assigned to work as a clerk in the warehouse, and was in charge of clerical work in the warehouse and was not an interpreter in the camp. [R. 4099.] Kawakita denied the act charged and Grant himself did not identify the defendant as participating.

OVERT ACT C.

Overt Act (c) sets forth the third overt act found by the jury, as follows:

“(c) During December, 1944, at Camp Oeyama, on a date to the grand jury unknown, the defendant TOMOYA KAWAKITA and the Japanese guards did line up about thirty members of the armed forces of the United States who were then and there prisoners of war in Camp Oeyama and as punishment of said prisoners of war for making mittens and shoe linings from pieces of blankets for protection from cold weather conditions and did at said time and place strike and beat them and force them to strike and beat each other.”

Again, this overt act is a justification for American prisoners of war destroying Government property. The evidence is entirely insufficient to show that Tomoya Kawakita “did line up about thirty members of the armed forces of the United States.” The punishment for the wilful destruction of Government property was decreed by Lt. Hazama and Sgt. Ichiba and Akamatsu, Kawakita did not line up any of the prisoners of war and, of course, they were not *members* of the armed forces but were disarmed forces.

Kawakita did not provide the punishment and there is no proof that the making of the mittens, or any use of cutting up a government property illegally was necessary as protection from cold weather.

There is no evidence by two witnesses that he did strike any one person, or beat any one person, or that he forced any one to strike another person or beat another person. The orders were all a part of the Military.

Kawakita, then working as a warehouse clerk, denied any participation.

OVERT ACT D.

Overt Act (d) charged Kawakita, in August, 1945, as follows:

“(d) During August, 1945, the exact date of which to the grand jury is unknown, the defendant TOMOYA KAWAKITA, at Camp Oeyama, did impose punishment on one Thomas J. O'Connor, a member of the armed forces of the United States and then and there a prisoner of war in said camp, for a breach of camp rules by assaulting, striking, and beating said Thomas J. O'Connor and repeatedly knocking him into the drain or cesspool of the said camp, causing the said Thomas J. O'Connor temporarily to lose his reason.”

Proof as to this overt act was also insufficient. O'Connor at no time said Kawakita participated in punishing him for a breach of the camp rules in August, 1945. [R. 5261-2.] Nor was there any reference to Kawakita in his report to the Navy investigating war crimes after the close of the war. Dr. Bleich's records reveal no report of Kawakita. The men generally described Ichiba and Akamatsu

as being the ones who punished O'Connor after he was caught stealing. Dr. Bleich's record shows Sgt. Ichiba, Akamatsu and Corp. Kondo. No mention is made of Kawakita.*

The Insufficiency of Overt Act (g).

Overt Act (g) is as follows:

"(g) On a date in July or August, 1945, the exact date of which is to the grand jury unknown, a work detail consisting of members of the armed forces of the United States who were then and there prisoners of war at said Camp Oeyama, including in their number one David R. Carrier and George W. Simpson, returned thirty minutes early from their assigned

*In his statement for the War Crimes Office, Thomas J. O'Connor, on August 26, 1946, said that in relation to the incident alleged in the indictment:

"Q. Did you receive any other beating while at this camp?
A. Yes. Around 1 August 1945, I broke into a Japanese warehouse with two other men. I escaped, but the other two were caught and beaten so badly that I confessed my part in the affair. The Japanese then ceased beating the other men and concentrated their efforts on me. . . .

Q. Can you identify or name any of the Japanese responsible for this incident? A. Yes, I was beaten by the two Sergeants at the Camp—Ichiba Goonsaw (1st Sgt.) and Akomatsu Goonsaw (Sgt.) . . .

Q. Who do you think was responsible for these conditions?
A. The Camp Commander. . . .

Q. Can you name or otherwise identify any of the Japanese officials at this camp? A. No. I don't recall the name of the camp commander. A man by the name of Marista San was in charge of the galley."

O'Connor also described an incident that allegedly occurred while Kawakita was in China, to-wit, in the middle of August, regarding a Private in the Marine Corps named Killer (nicknamed Foghorn), "who was punished for eating a radish and" the rough treatment resulted in his death two weeks later. There is no such record. The records of the camp and the testimony of Dr. Bleich did not reveal any such alleged occurrence. [See Exhibit AK.]

duties as such prisoners of war and were compelled by the Japanese sergeant in charge to run twice around the inner quadrangle of the building of said camp and thereafter the defendant TOMOYA KAWAKITA did compel the said David R. Carrier and George W. Simpson, who were unable to run fast enough by reason of illness resulting from their captivity, to run an additional four times and six times respectively around said quadrangle of said camp."

The act itself alleges two different dates in 1945. Neither date was established nor any specific date was established by any or all of the witnesses, or two direct witnesses to the same overt act. The constitutional requirement means two persons who saw the whole of the same act or such portion of the act. The evidence did not show that there was a work detail consisting of members of the armed forces—but there was a detail of disarmed forces. There was no proof that Tomoya Kawakita *did compel* David R. Carrier and George W. Simpson to run an additional four times and six times respectively around the quadrangle of said camp, but said compulsion, according to the testimony, was by the Japanese Sergeant who also stopped the running around the compound. [R. 281.] Kawakita at no time compelled either men to run additional times and that was ordered by the Sergeant. Nor is there any proof by any authorized authority qualified to testify that they were "unable to run fast enough by reason of illness." Dr. Bleich did not testify to that effect and the testimony of the men themselves is that they did run around the quadrangle. Furthermore, this transaction was allegedly

punishment for violation of a rule of camp, directly under the military authority. According to the testimony of one witness, running around the compound is a mild form of military punishment and used to be common strict discipline for breach of the camp rules in the United States army also.

The Insufficiency of Overt Act (i).

Overt Act (i) alleged as follows:

“(i) That on or about December 17, 1944, at or near the said open pit ore mine, the defendant, TOMOYA KAWAKITA, did order and compel Johnie T. Carter, then and there a member of the armed forces of the United States and a prisoner of war at Camp Oeyama, to carry a heavy log up an ice-covered slope that the said Johnie T. Carter, who was then and there suffering from malnutrition and in a weakened physical condition, slipped and fell and received a serious spinal injury; that the defendant, TOMOYA KAWAKITA, then and there denied medical care to the said Johnie T. Carter and delayed his removal to Camp Oeyama for a period of approximately five hours.”

There is no proof of any credible witness and the evidence does not establish that Kawakita “ordered and compelled Carter to carry a heavy log up an ice-covered slope” but that Carter was under orders of the Military to carry the log. There is no evidence that Carter was suffering from malnutrition and in a weakened condition, when he slipped and fell, other than those similar to all the prisoners who were working. There is no evidence that Kawakita denied medical care to the said Johnie T. Car-

ter, nor that he delayed his removal to Camp Oeyama for a period of approximately five hours.

Carter, who was injured, was not moved and it is said to be good medical technique not to move a man in his condition except by competent medical orderlies or persons familiar with the possible injury. There is no evidence that any medical orderlies were immediately available. One witness testified that Kawakita said he would have the medical orderlies take him. There is no evidence that there were any facilities to remove Carter back to the camp before the time that he was actually moved on the trains regularly going back to the camp where he received medical attention.

The Insufficiency of Overt Act (j).

Overt Act (j) is as follows:

“(j) On a date in May, 1945, the exact date of which is to the grand jury unknown, the defendant TOMOYA KAWAKITA, at a warehouse near Camp Oeyama, did order and command John J. Armellino, a member of the armed forces of the United States, who was then and there a prisoner of war at said Camp Oeyama, and weak and emaciated, to carry for a distance of approximately 500 feet two heavy buckets of white lead instead of one bucket which Armellino had been carrying, and did then and there strike and beat the said John J. Armellino in order to compel him to perform this labor.”

There is no evidence that Kawakita ordered and commanded Armellino to carry the paint, but there were apparently orders for *all prisoners of war to carry two buckets of paint* and Armellino was not carrying out the order. There is no evidence that Armellino was a member

of the armed forces but was a disarmed member of the work battalion. There is no evidence that Armellino was weak and emaciated any different than any other prisoners of war. There is no credible evidence that Kawakita struck Armellino in order to compel him to perform this labor, which he was required in any event to perform.

The Insufficiency of Overt Act (k).

Overt Act (k) charges as follows:

“(k) That on a date in the late spring or early summer of 1945, the exact date of which is to the grand jury unknown, the defendant, TOMOYA KAWAKITA, within the confines of Camp Oeyama, did participate in and assist Japanese military personnel of Camp Oeyama in directing and executing the following cruel, inhuman, and degrading punishment of Woodrow T. Shaffer, a member of the armed forces of the United States who was then and there a prisoner of war of the Japanese government at Camp Oeyama, to-wit, the said Woodrow T. Shaffer was forced to kneel for several hours on a platform with a stick of bamboo placed on the inner side of the joints of his knees and to hold at arms length above his head a bucket of water and subsequently a heavy log, and was then and there struck and beaten by the said TOMOYA KAWAKITA,”

There is no exact date specified. Shaffer stole beans—a most serious infraction of the laws of Japan and the camp rules and regulations. He admitted his crime to the Japanese Military which imposed the punishment. There is

no evidence that Shaffer was a member of the armed forces but was a member of the work battalion. The evidence is that the Military personnel caused him to kneel and it was the Military personnel who carried out the punishment of Shaffer for his serious infraction of the rules of the Military personnel.

There Were No Two Direct Witnesses of a Clear and Convincing Nature to the Same Overt Acts.

Dates were uncertain, the surroundings and the circumstances were uncertain and each of the acts could have been committed—if they were committed at all—on more than one occasion.

Sgt. Montgomery, although an intelligence officer for the army, could not at the date of trial even recall the name of the American officer in charge of the camp after the Americans took over—although that officer was in charge for practically a month in the camp [R. 358], and he wasn't even sure of the name of the camp captain [R. 359] who was camp adjutant, and he wasn't sure whether a roll call was held. [R. 359.]

Photographs were obtained from Japan by the defense counsel of the Japanese officer [Lt. Hazama, nick-named "The Pig," Ex. B], Sgts. Ichiba [Ex. C] and Akamatsu [Ex. D], the active Japanese non-commissioned officers in charge. Corporal Kondo, and two photographs [Exs. H and I] of American and British and Canadian officers and men taken at Camp Oeyama at the close of hostilities.

Sgt. Montgomery, a trained investigator could not identify the individuals in the picture. See reverse side of Exhibit H. He was allowed to study the photographs

during the noon recess and the writing was his own comment and testimony. On Exhibit "I" he was only able to identify two named persons.

Of the Japanese personnel most of the witnesses were not even able to identify Lt. Hazama whom they disaffectionately named "The Pig"—until his picture and identification was published in a Los Angeles newspaper and the witnesses were stopping at the Hotel Northern in Los Angeles and discussing the testimony and pictures amongst themselves. [R. 394, 406.]

The case of treason stands upon a peculiar ground; there the overt acts must by statute be specially laid, and must be proved as laid.

United States v. Gooding, 12 Wheat. (25 U. S. 473, 475);

United States v. Wilson, 28 Fed. Case No. 16,730,-699,718;

United States v. Robinson, 259 Fed. 685;

Ex parte Bollman, 8 U. S. 75;

Cramer v. United States, 325 U. S. 1;

Haupt v. United States, 330 U. S. 631.

This the government failed to do.

* * *

The eight overt acts found by the jury were trivial in and of themselves in connection with the broad aspect of the crime of treason, and should not, of themselves, constitute treasonous acts.

Overt Act (a) was a charge of kicking Phillip D. Toland to cause him to greater exertion in his work. This,

if true, would be no more than a petty battery, which, if true, would call only for a fine of \$25. It was conceded that the American prisoners of war were all trying to do as little work as possible, and this happening—if it did occur—was not treasonous.

Of the eight acts found by the jury, two were with the objective of causing exertion on the part of those not exerting themselves; one was in not moving a man to the camp medical facilities for a period of five hours, from the mine when good medical technique says he should not be moved except by experienced medical corps men; and five acts were allegedly in aid of the military in carrying out punishments for theft of rationed and scarce articles and in breaking into the government storehouse.

What constitutes treasonous acts has been many times stated as, “by surrendering a castle of the King for reward, or selling the enemy guns, or assisting the King’s enemies, furnishing rebels or enemies with money, arms, ammunition or other necessities, will *prima facie* make a man a traitor.”

Foster Crown Cases, found in 792 chapter 3, sec. 8, page 216.

See:

United States v. Robinson, 259 Fed. 685;

Ex parte Bollman, 4 Cranch 75, 2 L. Ed. 554;

Cramer v. United States, 325 U. S. 1.

As stated by Chief Justice Marshall, in *Ex parte Bollman*, 4 Cranch 75, 8 L. Ed. 554:

“To prevent the possibility of those calamities which result from the extension of treason to offenses of minor importance, that great fundamental law

which defines and limits the various departments of our government has given a rule on the subject both to the legislature and to the courts of America, which neither can be permitted to transcend . . . It is, therefore, more safe as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide.”

In *Cramer v. United States*, 325 U. S. page 1, at page 34, the court said:

“It is obvious that the function we ascribe to the overt act is significant chiefly because it measures the two-witness rule protection to the accused and its handicap to the prosecution. If the overt act or acts must go all the way to make out the complete treason, the defendant is protected at all points by the two-witness requirement. If the act may be an insignificant one, then the constitutional safeguards are shrunk so as to be applicable only at a point where they are least needed.

The very minimum function that an overt act must perform in a treason prosecution is that it show sufficient action by the accused, in its settings, to sustain a finding that the accused actually gave aid and comfort to the enemy. Every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses. The two-witness principle is to interdict imputation of incriminating acts to the accused by circumstantial evidence or by the testimony of a single wit-

ness. The prosecution cannot rely on evidence which does not meet the constitutional test for overt acts to create any inference that the accused did other acts or did something more than was shown in the overt act, in order to make a giving of aid and comfort to the enemy. The words of the Constitution were chosen, not to make it hard to prove merely routine and everyday acts, but to make the proof of acts that convict of treason as sure as trial processes may . . . The Government is not prevented from making a strong case; it is denied a conviction on a weak one.

It may be that in some cases *the overt acts*, sufficient to prove giving of aid and comfort, will fall short of showing *intent* to betray and that questions will then be raised as to permissible methods of proof that we do not reach in this case. But in this and some cases we have cited where the sufficiency of the overt acts has been challenged because they were colorless as to intent, we are persuaded the reason intent was left in question was that the acts were really indecisive as a *giving of aid and comfort*. When we deal with acts that are trivial and commonplace and hence are doubtful as to whether they gave aid and comfort to the enemy, we are most put to it to find in other evidence a treacherous intent."

The essential elements of the crime charged are that Kawakita: (1) with intent to betray (treasonable intent); (2) gave (a) aid and (b) comfort to the enemy.

It is well established that the overt act and the intent are separate and distinct elements of the crime of treason under the Constitution of the United States.

In *Cramer v. United States*, 325 U. S. 1, at page 54, it is stated:

“It is well established that the overt act and the intent are separate and distinct elements of the crime of treason under the Constitution. See *Ex parte Bollman*, 4 Cranch (U. S.) 75, 126, 2 L. Ed. 554, 571; *United States v. Burr*, 4 Cranch (U. S.) 455, 2 L. Ed. 677, Fed. Cas. No. 14,1692a; *United States v. Lee*, 2 Cranch (C. C.) 104, Fed. Cas. No. 15,584; *United States v. Vigol*, 2 Dall. (Pa.) 346, 1 L. Ed. 409, Fed. Cas. No. 16,621; *United States v. Hanway* (C. C.) 2 Wall. Jr. 139, Fed. Cas. No. 15,299; *United States v. Greiner* (D. C.), 4 Phila. 396, Fed. Cas. 15,262; *United States v. Greathouse*, 2 Abb. (U. S.) 364, 4 Sawy. 457, Fed. Cas. No. 15,254; *United States v. Werner* (D. C.) 247 F. 709, 710; *United States v. Fricke* (D. C.) 259 F. 673, 677; *United States v. Robinson* (D. C.), 259 F. 685, 690; *United States v. Stephan* (D. C.), 50 F. Supp. 738, 742, 743, affirmed (C. C. A. 6th), 133 F. (2d) 87, 99. Chief Justice Marshall ruled in *United States v. Burr* (C. C.), Fed. Cas. No. 14,692h, that it was in the discretion of the prosecutor to present evidence of the intent before proof of an overt act. And see *United States v. Lee*, 2 Cranch (C. C.) 104, Fed. Cas. No. 15,584, *supra*.”

See also:

Haupt v. United States, 330 U. S. 631.

Acts innocent on their face must be judged in the light of their purpose and of related events. Unless they be *acts of aid and comfort, committed with treasonable purpose*, there is no intent to betray.

The prosecution in this case did not rely on the overt acts to establish the treason itself. Two of the overt acts which the jury found were acts in which the men were not doing the required amount of work under the established quota, although it must be admitted that they were malinger or stalling. If Phillip Toland was not doing enough work, and was kicked in the leg, to compel him to do more work, to come up within the standard required by those in charge of the camp, this could not be said to be done with any treasonable purpose; nor could the failure to have Carter removed to camp for medical treatment by one not a medical attendant specially be deemed an act which in itself was treasonous.

The other five acts were acts of aiding the Military in carrying out punishment for stealing or destroying government property, or for violating other regulations of the camp. There was nothing on the face of any of these acts which were treasonable in their character.

What other testimony was there, then, to show an intent to betray the United States of America? Testimony unrelated to the overt acts was introduced by Sgt. Montgomery that the defendant had berated General MacArthur for leaving the Philippine Islands in advance of his men. This surely did not show a treasonable intent, nor

that any of the overt acts were committed because the defendant thought that General MacArthur had left his troops in advance. In fact, the Chicago Tribune and many others had criticized General MacArthur, and such criticism does not constitute evidence of treasonable intent, in furtherance of which the overt acts must have been committed. (See Readers Digest of January, 1946.)

It was not contended by the Government that Kawakita kicked Toland to make him do more work according to the quota established because General MacArthur had left the Philippine Island in advance of his men.

The other evidences of treasonable intent was likewise lacking in that quality with which the designers of our Constitution created this one and only crime as a part of the Constitution, with its safeguards.

Cramer v. United States, 325 U. S. 1.

As said in *Cramer v. United States*, 325 U. S. 1:

“But to make treason, the defendant not only must intend the act but he must intend to betray his country by means of the acts.”

Nowhere in the entire record of 43 volumes is there one word of evidence expressed by the defendant, word or deed, that any of the eight overt acts committed by him, were committed with *intent* to *betray* the United States by means of the acts.

The Overt Acts and Each of Them Are in No Manner in Furtherance of the Crime of Treason.

None of the overt acts in the case at bar are in any manner in furtherance of the crime of treason.

In the footnote of *Cramer v. United States*, 325 U. S. 1, 7, the court says, quoting from *United States v. Fricke*:

“An overt act in itself may be a perfectly innocent act standing by itself; it must be in some manner in furtherance of the crime.”

In footnote 7, it says:

“An overt act, in criminal law, is an outward act done in pursuance and in manifestation of an intent or design; an overt act in this case means some physical action done for the purpose of carrying out or affecting [*sic*] the reason.” (*United States v. Haupt*, 47 Fed. Supp. 836, 839.)

“The overt act is the doing of some actual act, looking toward the accomplishment of the crime.” (*United States v. Stephan*, 50 Fed. Supp. 738, 742, 743.)

The eight acts which the jury found in this case were in no wise in furtherance of any of the crimes of treason:

Kicking Phillip D. Toland in order to compel him to work which he was temporarily not doing, was in no wise an act in furtherance of treason;

Assisting military—if it occurred—in meting out punishment for theft, for destroying government property, was in no wise in furtherance of any treason;

Assisting the military—if it occurred—in causing the men to punish each other was in no wise in furtherance of treason, nor

Causing a man to carry an extra bucket of paint, or to run around the compound for returning from work earlier, anywise in furtherance of treason.

Treason is the betrayal of one's country, not making one work or carry an extra bucket of paint, or get punished summarily for theft or cutting up government property, or otherwise disobeying internal rules in a prisoner of war camp. The very statement of the case seems to be a complete answer to the argument that this could be treason.

The trial court not only held it to be treason, but made the most of it—the death penalty.

Two things are necessary to be established beyond a reasonable doubt under the constitutional definition of treason. They are both "aid" and "comfort." The Constitution sets them out in the conjunctive. Both are necessary. In the law of search and seizure it is said they are separate.

Although one might aid another without his knowing it, the word comfort pays a connotation of knowledge on the part of the recipient of the comfort that he is being comforted. Each and both are necessary to make out a case of treason.

It is difficult to conceive any aid and comfort to the Government of Japan in causing a soldier to do work that he is required to do, or in aiding the military in enforcing required discipline.

It was held in Pryor, Federal Case No. 16095, 2 Biff. 344 that the mere going ashore from an enemy vessel on which defendant was a prisoner, although with intent to procure provisions for the use of the enemy, does not constitute treason.

Likewise, in *United States v. Fricke*, 259 Fed. 673, it was held that assistance to an alien enemy known to be such, intended only as aid to him as an individual, is not aiding and comforting enemies of the United States within the meaning of this section.

The constitutional definition of treason leaves no room for Congress to extend or limit the definition, and limits the power of Congress over such subjects to prescribing the punishment. (*United States v. Greathous*, Fed. Cas. No. 15254, 4 Sawyer 457, 2 A. BBUs 364.)

We cannot conceive under any of the facts of this case how any of the acts charged herein either strengthened or tended to strengthen Japan and either weakened or tended to weaken the United States of America in its actual conduct of the war.

We would be very much shocked that Japan, even if it had known of the acts which has been charged, to have awarded Tomoya Kawakita an "E" for helping win the war, or that Hirohito would bestow his blessing on him for any of the things charged here. And every soldier of the United States who helped to win the war would resent the thought that these acts intended to help the Government of Japan to the extent of helping them win the war.

Lack of Proof of the Evidence of Aid and Comfort.

As said in *Cramer v. United States*:

“Of course the overt acts of aid and comfort must be intentional as distinguished from mere negligence or undesigned ones. Intent in that limited sense is not an issue here. But, to make treason, the defendant not only must *intend* the *acts* but he must intend *to betray* his country by means of the acts.”

Like Cramer, it is here that Kawakita defends. A re-examination of the entire evidence shows no intent to betray the United States by means of any of the acts alleged in the indictment.

We have pointed out all the acts in their setting heretofore. We have set out in the appendix the summary of the evidence offered by the Government on the question of intent to betray. We challenge the Government to point to any act which shows that Kawakita intended to betray the United States by means of any of the acts alleged. After three months of trial, they failed to prove that Kawakita was a traitor to the United States. They cannot point to a single alleged overt act found by the jury that was giving *aid* and *comfort*.

Treason as defined in the Constitution is restricted “to cases where also there was conduct which was ‘giving them aid and comfort.’” The word “comfort” connotes knowledge on the part of the Government in whose behalf the betrayal occurred. This is entirely absent in the present case.

“‘Aid and Comfort’ was defined by Lord Reading in the Casement trial comprehensively, as it should be, and yet probably with as much precision as the nature of the matter will permit: ‘. . . an act which

strengthens or tends to strengthen the enemies of the King in the conduct of a war against the King, that is in law the giving of aid and comfort' and 'an act which weakens or tends to weaken the power of the King and of the country . . . is . . . giving of aid and comfort.' ”

Cramer v. United States, 325 U. S. 1, pp. 28, 29.

Clearly the act must show something toward treason. It must show aid and comfort. (*Cramer v. United States*, 325 U. S. 29, 30.) Aiding the Japanese Military Authority to render summary punishment for burglary, theft and destruction of government property by prisoners in a disarmed labor battalion, and compelling a person not temporarily working to work, and using one's own discretion as to the time to return an injured person to a prisoner of war camp for medical treatment could not weaken, or tend to weaken, the United States to resist or attack the enemies of the United States, nor could it tend to strengthen Japan in the conduct of the war against the United States. There was no aid and comfort to Japan.

By International Law and the treaties between the United States and Japan the prisoners of war were then disarmed laborers in the camp and within the power of the enemy. There could be no aid and comfort in this setting. There was no intent and purpose to strike at the United States in any of the acts charged.

“Environment illuminates the meaning of acts, as context does that of words.”

Cramer v. United States, 325 U. S. 33.

“If the act may be an insignificant one, then the constitutional safeguards are shrunk so as to be applicable only at a point where they are least needed.”

Cramer v. United States, 325 U. S. 34.

To quote the language of *Cramer v. United States*, recording from *Ex parte Bollman*, 4 Cranch. 75, at 125, 127:

“The crime of treason should not be extended by construction to doubtful cases.”

Lack of Aid and Comfort of the Degree Constituting Treason.

There could be both aid and comfort to Japan and still be no treason. Thus the acts of Dr. Bleich, the senior American doctor in the camp may have given both aid and comfort to Japan. He treated not only Americans but he treated Japanese, and by his presence as a doctor in the Camp, if the theory of the Government is to be followed, there was one less Japanese doctor required on account of his presence and his work there, and treating ill Japanese personnel might have been of some “aid” to Japan. Certainly it was not treasonable. Thus, he may have given aid and comfort, but there was no treason in this for there was no intent to betray.

As said in *Cramer v. United States*, 325 U. S. 1:

“If there is no intent to betray there is no treason.”

Cases of adhering to the enemy are not many. Only eleven reported cases existed under our Constitution. Since that time, two cases have gone to the Supreme

Court of the United States, to-wit: *Cramer v. United States*, 325 U. S. 1, and *Haupt v. United States*, 330 U. S. 630. The *Cramer* and the *Haupt* cases grew out of alleged aid to known enemy agents who came here on a mission of sabotage. They had harbored and sheltered, according to the allegations, saboteurs and concealed their money after they had landed here on a subversive mission. *Cramer's* case was reversed on the insufficient proof by two witnesses because the court found that the act which two witnesses saw could not on their testimony be said to have given assistance or comfort to anyone—whether it was done treacherously or not. (Opinion of Justice Jackson, 330 U. S. 633, 635, in commenting on the *Cramer* case.)

The court said, also, in *Haupt v. United States*, 330 U. S. 634:

“We have held that the minimum function of the overt act in a treason prosecution is that it shows action by the accused which really was aid and comfort to the enemy. (*Cramer v. United States*, 325 U. S. 1, 34, 89 L. Ed. 1441, 1469, 65 S. Ct. 918.) This is a separate inquiry from that as to whether the acts were done because of adherence to the enemy, for acts helpful to the enemy may nevertheless be innocent of treasonable character.”

We submit that an examination of this entire record shows the lack of such acts being of any treasonable character.

The other treason case of adhering was that of *Stephan v. United States*, 133 F. 2d 87 (6th Cir., 1943), 318 U. S. 781, 783, 319 U. S. 783.

Justice Learned Hand said, in *United States v. Robinson*, 259 Fed. 685 at 690:

“Nevertheless a question may indeed be raised whether the prosecution may lay as an overt act a step taken in execution of the traitorous design, innocent in itself, and getting its treasonable character only from some covert and undeclared intent Therefore I have the gravest doubt of the sufficiency of the first and second overt acts of the first count and of those of the second count, which consist of acts that do not openly manifest any treason. Their traitorous character depends upon a covert design, and as such it is difficult for me to see how they can conform to the requirements.”

For other cases of adherence to the enemy, see *United States v. Werner*, 247 Fed. 708; *United States v. Haupt*, 47 Fed. Supp. 836, 839, Append. 136 F. 2d 661; *United States v. Stephan*, 30 Fed. Supp. 738, 742, Append. 133 F. 2d 87, 89, and unreported opinion of Judge Clancey in *United States v. Werner*, So. Dist. of N. Y. 1943, and the recent series of *Broadcast* cases. One of which reached the Circuit Court of Appeals and was not reviewed by the Supreme Court of the United States, to-wit, *Chandler v. United States*, 171 F. 2d 685.

Insufficiency of the Evidence of Intent to Betray.

Paragraph (5) of the indictment charges:

“The said defendant Tomoya Kawakita, in the prosecution, performance, and execution of said treason and of said unlawful, traitorous, and treasonable adhering and giving aid and comfort to the enemies of the United States aforesaid” did the acts “unlawfully, feloniously, traitorously, and treasonably, *and with treasonable intent* to adhere to and give aid and comfort to said enemies.”

This allegation in the indictment is a pure imaginary conclusion.

There is not one word of support in the evidence of “intent” to betray.

We have set out in the appendix all of the evidence which the government produced with reference to *intent to betray*.

This evidence is isolated, disconnected and in no sense establishes any intent to betray the United States.

What Is Intent to Betray?

Judas Iscariot betrayed Christ for thirty pieces of silver. Brutus betrayed Julius Caesar; Benedict Arnold betrayed the Colonial Armies to the British. Giving money, food or military intelligence to the enemy have shown intent to betray, and broadcasting propaganda for the enemy by the American citizens for the purpose of weakening his own country and insuring the enemy of success has been held in more recent cases to evidence an intent to betray. (See *Chandler v. United States*, 171 F. 2d 685.)

But, none of the acts charged in this case, borrowing an expression from the law of negligence, show in and of themselves any *proximate cause* or *relationship* with any intent to betray. The testimony relates to conversations and alleged acts which are isolated, disconnected and inflammatory. There must be a treasonable project and the accused must have committed the overt acts with the knowledge or understanding of its treasonable character.

Cramer v. United States, 325 U. S. 35, also 60.

The prosecution cannot rely on evidence which does not meet the constitutional test of intent to betray to create an inference that the accused did other acts, or did something more than was shown in the overt acts, to constitute *betrayal*.

In *Cramer v. United States*, 325 U. S. 1 at page 35, the court said:

“It may be that in some cases the overt acts, sufficient to prove giving of aid and comfort, will fall short of showing intent to betray and that questions will then be raised as to permissible methods of proof that we do not reach in this case. But in this and some cases we have cited where the sufficiency of the overt acts has been challenged because they were colorless as to intent, we are persuaded the reason intent was left in question was that the acts were really indecisive as to giving of aid and comfort. When we deal with acts that are *trivial* and *commonplace* and hence are doubtful as to whether they gave aid and comfort to the enemy, *we are most put to it to find in other evidence a treacherous intent.*”

In examining all the other evidence, we confidently assert that there is no evidence therein of any treacherous intent.

The element of treasonable intent is an element separate from the overt act which may be proved by any relevant evidence as reaffirmed in the *Cramer* decision.

Cramer v. United States, 325 U. S. 1, 31, 89 L. Ed. 1459;

Haupt v. United States, 330 U. S. 630.

Treasonable intent must be a specific intent to betray the United States of America. There is no such proof in this entire record. During the long deliberation of the jurors—on the sixth day—one of the jurors asked the trial judge to define the word “betray.” The court gave the jury a haphazard definition which he himself designated as unsatisfactory. The defense counsel thereupon offered a dictionary definition of the word “betray.” The court declined to give it. [Clk. Tr. p. 284.] This showed that the jury itself was floundering with the question of treasonable intent.

In *Haupt v. United States*, 300 U. S. at page 645, Mr. Justice Douglas said:

“As the *Cramer* case makes plain, the overt act and the intent with which it is done are separate and distinct elements of the crime.

“For proof of treasonable intent in the doing of the overt act necessarily involves proof that the accused committed the overt act with the knowledge or understanding of its treasonable character.”

The record in this case is not only silent as to any proof of any treasonable intent, the record is affirmatively a com-

plete showing that the accused had no knowledge or understanding of any treasonable character of any act allegedly committed by him.

As we examine the overt acts in their setting, we can well understand why they lack such a character. Men confined in the camp were not soldiers any longer in any practical sense, they were prisoners of war and as Sergeant Montgomery said, "a labor battalion." International law was local law and rules and regulations adopted in the form of mutual treaties between the two countries made these prisoners of war nothing more than prisoners in an actual sense as well as in a military sense. They were placed in a confined area; military or prison guards were placed over them; they were required to obey these prison rules and regulations; they were required to salute the guards; they arose and obeyed in military fashion all of the commands of their superiors, the country which held them within its power under the terms of the Hague treaty.

The overt acts, and each of them, in this setting showed no character of treasonable intent.

Phillip Toland, overt act A, by his own admission was not working, for about three minutes he had stood without doing any work. He had been approved by the doctor for work as was customary to approve all persons before they were sent out to work which approval was by the American doctor. He made no complaint of his failure to be able to work, nor did he ask to be relieved from it. The alleged act of kicking him which had occurred, therefore, was not of a character that bore any relationship to any treasonable intent such as we have always under-

stood, in intent to betray such as sending information or intelligence to the enemy.

As Justice Douglas said:

“The requirement of an overt act is to make certain a *treasonable project* as moved from the realm of thought into the realm of action. *Haupt v. United States*, 330 U. S. 645.”

That requirement has not been met in the present case. There was no treasonable project either in thought or action. The second overt act was punishment of Grant for burglary and theft.

The next incident was the Carter incident, where Carter fell and hurt himself while on a log carrying detail. It happened in the afternoon, and it was said that Kawakita did not permit Carter to be taken forthwith back to the camp for medical treatment. He was taken back at 5:00 o'clock in the afternoon on the usual train which took prisoners of war back to the camp. While there is a wide difference of opinion or evidence regarding what actually happened, the Government failed to prove that there was any train available to take him back, or that he could not be taken to the Mining Hospital, which was located nearby, or that, as a matter of fact, it was proper to move a person who might have had a bone injury until there were proper facilities for moving him.

In any event, there was certainly nothing treasonable to the United States in the character of this act, if it occurred; and the matter of the delay of a few hours in his transportation, if it occurred, could not convert this alleged failure to act into an act of treason.

Every day we have on our streets people who are injured in automobile accidents and have them lie there for

a long time before police ambulances arrive. Policemen stop other people from picking them up, or transferring them until they have the proper facilities and the properly equipped person to move them. No medical or expert testimony was offered to show that Carter was not handled exactly right even from a medical standpoint. Certainly lay men were not qualified.

There certainly was nothing treasonable in the character of this alleged overt act, and nothing which showed any treasonable intent.

Nor could treason be garnered from having a man carry an extra bucket of paint. There was certainly nothing treasonable in this act.

The other five alleged overt acts were allegedly assisting the military authorities in carrying out the punishments for admitted thefts and crimes, destruction of government property in the prisoner of war camp itself.

None of the punishments were ordered by Kawakita. At some of them he was not present at the outset and it is not denied that all of them were ordered by the military authorities, and carried out under their direction and command and ended under their direction and command.

The disciplining of prisoners of war in a foreign country within zone territory at a time when the government is an integrated power and acting within treaty obligations, certainly carries no treasonable intent, even if it may be objectionable and contrary to our own standards of punishment.

An examination of each of the acts will show that there was no treasonable intent in any of them.

The Government Itself Did Not Contend, During the Trial, That the Acts Here Charged Showed Treasonable Intent, but They Relied on Independent and Different Evidence to Show Treason.

The policy of that evidence, in the setting of this case, and the type that was furnished, was that there was no proximate cause between the alleged intent and the overt act charged in the indictment. The disassociated evidence of alleged intent was likewise trivial and commonplace in its character.

Cramer v. United States, 325 U. S. 1.

We have set out the *intent evidence* in the appendix because of its length. None was proof of specific intent to betray the United States by means of any of the overt acts. To borrow an expression from the law of negligence there was no proximate causal relation between the two.

The words might lawfully have been uttered by a citizen of the United States.

Hartzell v. United States, 322 U. S. 680, 689.

To permit an intent to betray to be inferred from speech regarding a war and to convict for some later trivial act disconnected with the speech is to enlarge the crime of treason far beyond historical conceptions, and to make any war talk some evidence of treasonable intent is to stretch the law of treason beyond its prescribed constitutional and statutory limits.

Time after time the court admitted testimony regarding trivial matters, completely disconnected with any overt act,

under the guise of showing "intent and state of mind." None of these alleged incidents, as a matter of law, could arise to the level required to show a treasonable intent and state of mind. The only result was to inflame the minds of the jurors and prejudice them against the defendant.

Below are these incidents with references to the reporter's transcript where the offer was made for their admission on the ground referred to, the proper objection made, the court's ruling and the evidence received. A careful reading of these references will disclose that in most instances other Japanese were present and when taken into consideration along with the circumstances in this case the proper inference should be that the defendant was interpreting orders given by his superiors and not going to show his own intent or personal state of mind.

Testimony was received that the defendant thought it was dirty of General MacArthur to leave the men in the Philippines and that he was no good. [See Rep. Tr. p. 365, lines 6-25.] Also that "It looks like MacArthur took a run-out powder on you boys." [See Rep. Tr. p. 648, lines 1-6.] And a statement that "Roosevelt was no good." [See Rep. Tr. p. 1981, line 3, to p. 1982, line 5.]

Similarly witnesses were permitted to testify time after time to incidents where the defendant had urged the prisoners to get out more work with many instances where the Japanese hanchos were standing right along side of the defendant so that the only fair inference is that the orders came from the other Japanese and not from the defendant. [See Rep. Tr. p. 600, lines 4-22; p. 964, lines 4-9; p. 965, lines 2-5; p. 1079, line 19, to p. 1080, line 11; p. 1158, lines 12-18; p. 1159, lines 3-10; p. 1211, lines 13-23; p. 1334, line 4, to p. 1336, line 7; p. 1402, lines 7-10; p.

1696, line 9, to p. 1699, line 4; p. 1779, line 8, to p. 1780, line 4, and p. 2432, line 1, to p. 2433, line 16.]

Evidence was also received on the same grounds that the defendant had taken away the rations of certain men because they were too ill to work [see Rep. Tr. p. 651, line 11, to p. 654, line 17, and p. 2218, lines 5-21] or because they had not done sufficient work [see Rep. Tr. p. 1707, lines 5-12] and that the defendant had made a prisoner work even though the Japanese hanchō had permitted the man to rest because of illness. [Rep. Tr. p. 1893, line 10, to p. 1894, line 6.]

Prejudicial evidence was received regarding alleged statements of the defendant as to his opinion of which race was superior. For example: "The Japanese were a little superior to your American Soldiers" [see Rep. Tr. p. 648, lines 1-6]; and "* * * the Japanese were far superior to the American people and if the American army had Japanese officers, why, they could whip the world." [See Rep. Tr. p. 1509, line 13, to p. 1510, line 17.]

When one considers that the defendant was at the camp in the capacity of an interpreter the normal construction to put on his statements is that he was interpreting the orders of his superiors. However, the court admitted prejudicial testimony tending to show that the defendant was giving orders on his own initiative. In some instances the witness used the word "order" and considerable time was consumed getting the witness to whip his testimony into shape to get around an objection that it was his conclusion. [For examples see Rep. Tr. p. 724, line 17, to p. 725, line 6; p. 726, line 21, to p. 727, line 4; p. 1280, line 8, to p. 1281, line 5; p. 1281, line 17, to p. 1282, line

9; p. 1502, line 9, to p. 1503, line 13; p. 1700, line 25, to p. 1701, line 5; p. 1703, line 13, to p. 1704, line 14; p. 2043, line 7, to p. 2045, line 23, and p. 2436, line 8, to p. 2437, line 8.]

And alleged statements of the defendant as to how long the war would last and who would win were permitted in evidence as going to show intent and state of mind. [See Rep. Tr. p. 791, lines 6-17; p. 881, line 19, to p. 882, line 1, and p. 962, line 13, to p. 963, line 3.] The same is true of statements that the defendant intended to return to the United States with several witnesses testifying that the defendant said he would be a "big shot" because he knew both languages. [See Rep. Tr. p. 882, line 16, to p. 883, line 6; p. 1166, lines 14-22; p. 1705, line 23, to p. 1706, line 16; p. 1776, line 15, to p. 1777, line 17; p. 2046, line 16, to p. 2047, line 5, and p. 2159, line 19, to p. 2160, line 7.]

Some of the evidence received to show intent and state of mind of the defendant to support a charge of treason, if it were not for the many instances of inflaming the minds of the jurors against the defendant, should be construed to show a disposition of the defendant to prevent the prisoners from receiving more severe punishment. For example a statement of the defendant that "I guess you fellows understand the circumstances. If you don't work, why, you will suffer." [See Rep. Tr. p. 1277, line 4, to p. 1278, line 11.] The same is true of such statements as "Don't you know you are not allowed to have this kindling," "Don't you know it is against the camp rules

and regulations?" [See Rep. Tr. p. 1160, lines 7-24.] Also when the defendant was accused of taking some roasted nuts from the witness Bruce [Rep. Tr. p. 2758, line 23, to p. 2761, line 5] or a cigarette [Rep. Tr. p. 2764, line 24, to p. 2767, line 5] when they were supposed to be working.

Many of the alleged statements of the defendant could only have been offered to arouse the jurors' passion and prejudice against the defendant for there is no possible connection between any of the overt acts or even the general subject of treason. For instance calling Red Cross furnished corned beef "American garbage" [Rep. Tr. p. 1332, line 22, to p. 1333, line 11]; or that the Japanese "couldn't waste any good medical aid on a bunch of lazy Americans" [Rep. Tr. p. 1336, lines 19-25]; or that the United States Government "never gave me a damn thing" [Rep. Tr. p. 1374, line 12, to p. 1375, line 23]; or the statement allegedly made on the day hostilities ceased that "you will be getting fat from now on." [Rep. Tr. p. 2221, lines 4-15.] The same is true of alleged statements that the defendant wished the Americans were all dead. [Rep. Tr. p. 1641, line 21, to p. 1642, line 8; p. 1860, lines 3-17.]

Probably the prize alleged situation offered by the government and admitted into evidence to show intent and state of mind was the testimony of the witness Carter that the defendant had made two of the boys thumb their nose at the United States. The witness testified to repeated

trips by the defendant into the jimusho, or Japanese office, while this incident was going on as well as to the presence of other Japanese. Yet the prosecution offered and the court admitted this evidence as tending to show the personal intent and state of mind of the defendant. [See Rep. Tr. p. 1856, line 16, to p. 1859, line 1.]

Taking into consideration all of the circumstances in this case, the defendant contends that, as a matter of law, the above-mentioned evidence could not possibly go to show a treasonable intent and state of mind and was of such a prejudicial and passion arousing nature that the conviction must be set aside.

To Save Repetition Under the Heading of Errors of the Trial Court in the Admission of Evidence We Also Urge That the Admission of All of This Evidence to Show "Intent" Was Prejudicially Erroneous.

It must be clear that dual citizens of the United States residing in an enemy state are not guilty of treason by reason of some acts of trafficking with the enemy which, in the case of other citizens, might warrant a conviction.

"(b) Treason is not committed by the expression of ideas and opinions.

'Mere words that are expressions of opinion, printed or written, will not constitute acts of treason' or 'intent' to betray."

Frohwerk v. United States, 249 U. S. 204, 208;

United States v. Werner, 247 Fed. 708, 710;

Wimmer v. United States, 264 Fed. 11;

Equi v. United States, 261 Fed. 53;

United States v. Herberger, 272 Fed. 278;

Chafee: *Free Speech in the United States*, pp. 259-260;

Hurst: *Treason in the United States*, 58 Harvard Law Review 430. (This is a complete historical summary of the law of treason.)

Defendant's State of Mind.

The evidence regarding Kawakita's state of mind at that time did not meet the burden of proof required of the Government to show that Kawakita did *not in fact believe* that he was 100% Japanese during the times mentioned in the indictment or to show that he had any intent to betray the United States.

The proof was all to the contrary.

The defendant, at all times, believed that he was a citizen of Japan owing his entire allegiance to Japan. The very evidence cited above to show "intent" if it proves anything, it proves that the defendant regarded himself as totally Japanese. Therefore, even though it might be argued that he was a dual citizen and therefore also a citizen of the United States under the Fourteenth Amendment, the entire evidence in this case is uncontradicted that he was a citizen of Japan owing allegiance to Japan, and that he therefore had at no time any intent to betray the United States.

III.

(A) The Trial Judge Erred in Holding That Venue Existed at Los Angeles, California and That the Trial Court in California Had Jurisdiction and That He Was Not Denied a Speedy Trial in Japan.

After the surrender of Japan, Camp Oeyama was taken over by the United States officers. Its consular officers were re-established, and they again became invested with the power to try all cases. (Title 22, U. S. C. 141-145.) They necessarily were still governed by the provisions of the Treaty of 1858 (*Ross v. McIntyre*, 140 U. S. 453, 35 L. Ed. 581; *Clark v. Allen*, 331 U. S. 508.) Major Martin was placed in charge. It became a Military occupation, or district. Military Commissions were also organized and ready to try any offender.

United States v. Rice, 4 Wheat. 246;

Croft v. Harrison, 16 Hiel 164;

Leitensdorf v. Webb, 20 Hiel 176;

The Grapes Hot, 9 Wall. 129;

New Orleans v. Steamship Co., 20 Wall. 387;

Dooley v. United States, 182 U. S. 222;

MacLeod v. United States, 229 U. S. 416;

Ex parte Quirin, 317 U. S. 1, 87 L. Ed. 3;

In re Yamashita, 327 U. S. 1.

Under the Sixth Amendment to the Constitution of the United States, the defendant was entitled to a speedy trial and in Japan, since it was by occupation a part of United States territory. He could have been tried by court martial if there was the slightest basis of the charges (Article 33, 81 and 82, Articles of War.) or by the American Consul or by a Military Commission.

Under Title 18, Section 3 (1946 Edition), any person who failed to report treason immediately was guilty of misprision of treason.

Not only did Congress provide court martial punishment for prisoners under the circumstances, but by the laws of war Military Commissions were authorized; but under the circumstances Kawakita became technically a prisoner of war himself, upon the Americans taking over the camp, and he could be prosecuted and punished in accordance with the Laws of Wars, or the Laws of Nations, or both, and in accordance with our own court martial procedure.

Title 22, Sections 141 and 142, U. S. C. A. give jurisdiction to the American consul-general to try criminal cases in Japan. The Treaty of the United States with Japan of June 17, 1857 and the Treaty of July 29, 1858 provide that Americans committing offenses in Japan should be tried by the American consul-general.

Title 22, U. S. C. A., page 72, Sections 140, 141, and see *Ross v. McIntyre*, 140 U. S. 453, 35 L. Ed. 581, affirming *In re Ross*, 44 Fed. 185.

The law provides that the trial of all offenses committed on the high seas shall be in the district where the offender is found, or into which he is first brought, includes the jurisdiction of the consul-general to try offenses.

Under Title 22, Section 145, jurisdiction in both criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States.

The Americans took over the camp on August 15, 1945. [R. 350.] Sgt. Montgomery was an investigator for the United States Army. The Americans began taking excursions around Miyazeu Bay at that time with Japanese.

[R. 357.] Kawakita was in and around the vicinity of the camp [R. 355] from August 15 to September 10th or 11th, when the men left the camp. [R. 356.] American officers maintained military regulations. [R. 358.] They took over the Japanese headquarters. [R. 358.] Fifteen men took off from the camp and were not seen again. [R. 359.] But Kawakita was not only around there, he went to the American Consulate repeatedly and to the 8th Army of Occupation. If he had committed treason he would have been arrested and prosecuted then, and there would not have been a delay of two years and a treason case which took seven months to manufacture after Kawakita was seen in the United States.

If Kawakita was guilty of treason, every one of the prisoners of war and witnesses for the government who testified against him were guilty of misprision of treason in not reporting it promptly. We assume, rather, that they did not commit misprision of treason and by the same token that Kawakita was not guilty of treason.

We turn now to the treaties between Japan and the United States.

The treaty of June 17, 1857, executed by the consul-general of the United States and the governors of Simoda, is the one which first conceded to the American consul in Japan authority to try Americans committing offenses in that country. Article IV of that Treaty is as follows:

“Art. IV. Americans committing offenses in Japan shall be tried by the American consul-general or consul, and shall be punished according to American laws. Japanese committing offenses against Americans shall be tried by the Japanese authorities, and punished according to Japanese laws.” (11 Stat. 723.)

The Treaty with Japan of July 29, 1858, in some particulars changes the phraseology of the concession of judicial authority to the American consul in Japan, but, as we shall see subsequently, without revocation of the concession itself. Its sixth article is as follows:

“Art. VI. Americans committing offenses against Japanese shall be tried in American consular courts, and when guilty shall be punished according to American law. Japanese committing offenses against Americans shall be tried by the Japanese authorities and punished according to Japanese law. The consular courts shall be open to Japanese creditors, to enable them to recover their just claims against American citizens, and the Japanese courts shall in like manner be open to American citizens for the recovery of their just claims against Japanese.” (12 Stat. 1056.)

As will be seen, the language of the fourth article of the Treaty of 1857 is that “Americans committing offenses in Japan shall be tried,” etc.; while the language of the sixth article of the Treaty of 1858 is that “Americans committing offenses against Japanese shall be tried,” etc. Offenses committed in Japan and offenses committed against Japanese are not necessarily identical in meaning. The latter standing by itself would require a more restricted construction. But the twelfth article of that Treaty obviates that. It is as follows:

“Art. XII. Such of the provisions of the Treaty made by Commodore Perry, and signed at Kanagawa on the 1st of March, 1854, as conflict with the provisions of this Treaty are hereby revoked; and as all the provisions of a Convention executed by the consul-general of the United States and the governors

of Simoda, on the 17th day of June, 1857, are incorporated in this Treaty, that Convention is also revoked."

It will thus be perceived that the revocation of the Treaty of 1857 was made upon the assumption and declaration that all its provisions were incorporated into the Treaty of 1858.

The war between the United States and Japan did not abrogate the treaty of extradition between those two countries.

Clark, Attorney General v. Allen, 331 U. S. 503;
Society for the Propagation of the Gospel v. New Haven, 8 Wheat. 464, 494.

The fact that Japan was under a military government from August 15, 1945, would not have precluded it from performing its obligations under a previous treaty.

Clark, Attorney General v. Allen, 331 U. S. 503;
Neely v. Henkel, 180 U. S. 109, 120.

It is clear that treaties may "confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limitations of the other" which will be enforced by the courts.

Edye v. Robertson, 112 U. S. 580;
United States v. Rauscher, 119 U. S. 407;
Johnson v. Browne, 205 U. S. 309;
Cook v. United States, 288 U. S. 102, 121;
Ford v. United States, 273 U. S. 593;
United States v. Schonweiler, 19 F. 2d 387;
United States v. Ferris, 19 F. 2d 925.

By January 1, 1946, the Military Commissions in charge of the Supreme Commander, General Douglas MacArthur, had been formed in Japan. Other Japanese were tried and punished by the Commission. At no time was Kawakita molested, or tried, or punished. Whatever information this case was based upon was then in the possession of the American forces. Sergeant Montgomery was in fact a counter intelligence agent or American spy, an investigator for the army. [R. 350.] He had full knowledge of everything that went on in the camp. Major Martin had taken over the camp; Lt. Bleich, the doctor in charge, had kept a diary for a long time. Kawakita's name nowhere appears in the diary. And Kawakita had many witnesses and records immediately available to defend.

Major Martin had used Kawakita as his chief aide in interpreting between natives and the American in arranging for telephone service for the camp, on taking Americans on excursion trips, arranging a prophylactic station at the police station for the American soldiers (after their visits to Japanese girls) and he and he alone of all of the three interpreters was used to arrange a banquet for American officers, and be present. He also arranged for their departure. He arranged for their trains, was at the depot at the time and assisted in getting all of the baggage aboard when the men left, and had in every way assisted the Americans in the camp. He was the last man they saw when they departed. Afterwards, he reported to the American Consul, who has the power of arrest, in making his application for passport, and went to the American

Consulate on several occasions. He also reported to the Eighth Army in seeking transportation back to the United States, and went there many times. At no time was it suggested that he be arrested or charged with any offense.

The case here, then, developed only after a former American prisoner of war, William Bruce, had bumped into the defendant in Sears Roebuck & Co. store in Los Angeles, who had prevented him, when he was a prisoner of war at Camp Oeyama, according to his testimony, from eating a nut. It was here that "treason" was born. It took seven months thereafter to create and manufacture a case which might appeal to former prisoners of war and bring about a prosecution in the United States where the defendant had no witnesses able to clear him.

If the defendant was guilty of treason, it was known to the officers and men while they were in Japan and before they left Japan, and the defendant was entitled to a speedy trial, either by the American Consul or by court martial or in the American Military Commission.

Sixth Amendment U. S. Constitution.

In the case of *Harris v. The Municipal Court*, 209 Cal. 41, the Supreme Court of California held that the failure of the State to bring a number of defendants to trial whom it had named only as John Does, although their names were available, was a denial of speedy trial. By statute, the California Penal Code holds that a person who is not brought to trial within sixty days after indictment,

has been denied speedy trial. In the Municipal Court, within 30 days.

In the present case, the defendant was actually reporting and actually "found" in Japan in Camp Oeyama, at the time the Americans took it over. He was there at all times after they took it over. He was available to the American *Consulate*, which has court jurisdiction over Americans (Title 22, Sec. 141-5); to the Eighth Army of Occupation; to the Military Commission and to all authorities at all times. He not only did not hide, he actually went to their offices on several occasions.

It is respectfully submitted, therefore, that he was denied speedy trial guaranteed by the Sixth Amendment to the Constitution of the United States, which provides as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a *speedy* and public trial."

(B) He Was Also "Found" in Japan Within the Meaning of Title 28, Section 102 (1946 Edition) and the United States District Court in Los Angeles, California, Therefore Had No Jurisdiction.

Ex parte Bollman, 4 Cranch. 75.

Having reported to the American Consulate numerous times, and to the Army of Occupation frequently, to hold he was "found" two years later under the facts of this case is to fly in the face of facts, and truth.

The Court Erred in the Instructions It Gave.

THE COURT ERRED IN GIVING THE FOLLOWING INSTRUCTION:

The court instructed the jury:

“In order then to be relieved of the *duty of allegiance* imposed by American citizenship, one must do some voluntary act of renunciation or abandonment of American nationality and allegiance. And it is the policy of our law to permit free exercise of the right of expatriation by all American citizens everywhere.” [Clk. Tr. p. 312.] (11-F.) (Emphasis ours.)

This instruction omits consideration of one relieved of the duty of allegiance by reason of presumptive expatriation, or presumptive non-citizenship. Also of rights of a dual citizen residing abroad. It is the position of the appellant that in order to be relieved of the duty of allegiance imposed by American citizenship, he may be either actively expatriated or *presumptively expatriated*. To be presumptively expatriated, one does not have to do some voluntary act of renunciation or abandonment of American nationality and allegiance. He is also relieved if he is a dual citizen residing in the country of his other citizenship.

The Court Gave No Instructions on Presumption and the
Effect of Presumptive Expatriation.

THE COURT ERRED IN THE FOLLOWING INSTRUCTION:

“Prior to the effective date of the Nationality Act of 1940, our law provided that any American citizen could expatriate himself by doing any voluntary act which evidenced an intent to renounce or abandon American nationality and allegiance; but our law further provided: ‘That no American citizen shall be allowed to expatriate himself when this country is at war’ (34 Stat. 1228).

When the Nationality Act of 1940 became effective, those provisions of our law were repealed; and at all times since January 13, 1941, American citizens have been permitted to expatriate themselves during war-time, *but only in the manner provided by treaty or by the provisions of the Nationality Act of 1940.*” [Clk. Tr. p. 314 (11-F(2)).]

That portion of the instruction that provides that one may expatriate ones self *only* by treaty or in the manner set out in the Nationality Act of 1940 will limit expatriation to the ways specified by our laws and does not take into consideration all the means of expatriation provided by foreign laws.

It is our position that *any voluntary act expressing an intention* to abandon citizenship is sufficient to expatriate. This is the holding of Judge Fee in *United States v. Yasui*, 48 Fed. Supp. 40. We think, therefore, that the limitation which the court places on the means of expatriation was an incorrect statement of the law.

We filed a written motion (motion of opposition to statute) as construed and applied. [Clk. Tr. p. 106.]

In the legislative history of the Nationality Act of 1940 it is stated:

“Sec. 406. The loss of nationality under this chapter shall result solely from the performance by a national of the acts or fulfillment of the conditions specified in this chapter.

The object of this section is to make it clear beyond question that loss of nationality under a provision of chapter IV in no way depends upon a ruling of any officer of the United States, whether in the Foreign Service or in the service of one of the branches of the Government in the United States. The finding of such an officer in any case that a person has lost his American nationality because of an action by such person, including the establishment by a naturalized citizen of a permanent residence abroad or the maintenance by such a person of a continuous residence in a foreign state, as specified in section 402 of the code, would relate solely to the determination of the question presented to such officer for decision.

It may be added that a person who shall have been denied recognition abroad as an American national by a diplomatic or consular officer of the United States, upon the ground that such person had expatriated himself by the performance of one of the acts specified in this chapter would not be without a legal remedy in case he should deem the ruling in his case unjustified and such ruling should be upheld by the Department of State. If such a person should be unable to take advantage of the provision of section 274 D of the Judicial Code, as amended by the act of Congress of June 14, 1934 (48 Stat. pt. 1,

955), concerning declaratory judgments,² he might, upon arrival at a port of entry into the United States, and denial of entry as a national, resort to *habeas corpus* proceedings upon the ground that he is entitled to enter the United States as a national thereof. There seems to be no doubt as to the possibility of having a judicial decision in cases of this kind, if a person applying for admission to the United States as a national thereof submits substantial evidence of facts upon which his claim to American nationality may be based but is denied a fair hearing upon the facts, *Chin Yow v. United States* (1907), 208 U. S. 8, or the facts being admitted, he is denied admission upon the ground that under the law he has not American nationality, *Weedin v. Chin Bow* (1927), 274 U. S. 657.

The question of nationality may also be presented to a court for determination through *habeas corpus* proceedings in the case of a person who has previously entered the United States and is held for deportation from the United States as an alien but who claims the right to remain in the United States upon the ground that he is a national thereof (*Ng Fung Ho* (1921), 259 U. S. 276; *United States ex rel. Bilokumsky v. Tod* (1923), 263 U. S. 149. With reference to this subject see also Bouvé, C. L., *The Exclusion and Expulsion of Aliens in the United States*, Ch. IV, *Judicial Review of Administrative Decisions*; Clark, J. P., *Deportation of Aliens from the United States to Europe*, Ch. VIII, *Administrative Standards and Methods*, *Judicial Review*, pp. 312-322; Cook and Hagerty, *Immigration Laws of the United States*, sec. 228, *The Writ of Habeas Corpus*; Willoughby on the Constitution (2d), vol. 1, p. 325, vol. 3, p. 1668;

²Borchard, E., *Declaratory Judgments*.

Freund, E., Administrative Powers over Person and Property, Ch. XIII; Dickinson, J., Administrative Justice and the Supremacy of Law, Ch. III).

Some of the most important decisions of the courts in this country concerning nationality have been obtained through *habeas corpus* proceedings. (See for example, *United States v. Wong Kim Ark* (1898), 169 U. S. 649; *Weedin v. Chin Bow* (1927), 274 U. S. 657; *Camardo v. Tillinghast*, 29 F. (2d) 527.) In cases brought before the courts on petition for *habeas corpus* the burden is ordinarily upon the Government to prove alienage (*Bilokumsky v. Tod*, *supra*)."

What we have said with reference to the legislative history of Section 808 of the Nationality Act would seem to dispose of the court's error.

THE COURT ERRED IN CONSTRUING THE NATIONALITY ACT OF 1940 AS THE EXCLUSIVE WAYS OF LOSING ONE'S NATIONALITY. THE ACT SO CONSTRUED AND APPLIED IS UNCONSTITUTIONAL.

- (a) *The Court Erred in Holding That the Nationality Act of 1940 Was the Exclusive Way in Which One Might Expatriate One's Self, or That Congress Had the Power to Limit the Natural Right of Expatriation.*

Congress by an Act adopted July 27, 1868, declared that:

"The right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness;"

and prescribed that:

"any declaration, instruction, opinion, order, or decision of any officer of the United States which de-

nies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this Government.”

Rev. Stat. Sec. 1999, 15 Stat. L. 223, 224, Title 8, Sec. 800;

This section has never been repealed or modified. It must be presumed that the Congress, in passing the Nationality Act of 1940, did not by its provisions intend to repeal or modify Section 800, or 15 Statutes at Large 223, 224, which is an expression of an existing policy inherent in our people, and was expressed July 27, 1868 and continued in all our national and international relationships since that date.

Any attempt to limit this policy, even by the Congress, is an impairment of a natural and inherent right of all people to the enjoyment of life, liberty, and the pursuit of happiness.

Any other policy is the policy of totalitarian government. It is the policy which Germany, Japan and Russia sought to impose upon their citizens who came to the United States.

The rulings of the trial court throughout this case, in holding that Kawakita necessarily was a citizen of the United States at all times in spite of his having registered his name in the Family Koseki, despite the fact that Japan recognized him as no longer an alien but one of its own subjects, and despite his having been employed in a position where only Japanese Nationals would be employed—is the ruling of the totalitarian governments, which we renounced in 1868, and by treaty with various countries, and by expressions which our State Department policies have constantly reiterated. (See Lawrence's

Wheaton, 925; Warton's Conflict of Laws, Sec. 5; Senate Ex. Doc. C. 38, 36 Congress, First Session, page 153; Ex. Doc. 91, 33 Congress, First Session; Mr. Jefferson to Mr. Manard, June 12, 1817; 7 Jeff Works 73; 2 John Adams Works 370; 7 John Adams Works 174; 9 John Adams Works 313, 314, 321; 10 John Adams Works 282.)

Mr. Fish, Secretary of State, wrote a letter to Mr. Washburne, June 28, 1873, in which he said:

“It seems to this Department that the individual right of expatriation, which was thus referred to by Chief-Justice Marshall, is recognized by that clause of the fourteenth amendment to the Constitution which makes *subjection to the jurisdiction* of the United States an element of citizenship. This conclusion is strengthened by the simultaneous action of Congress.”

President Grant, in his Fifth Annual Message to Congress, 1873, said:

“The United States, who led the way in the overthrow of the feudal doctrine of perpetual allegiance, are among the last to indicate how their own citizens may elect another nationality. The papers submitted herewith indicate what is necessary to place us on a par with other leading nations in liberality of legislation on this international question. We have already in our treaties assented to the principles which would need to be embodied in laws intended to accomplish such results. We have agreed that citizens of the United States may cease to be citizens; and may

voluntarily render allegiance to other powers. We have agreed that residence in a foreign land, without intent to return, shall of itself work expatriation. We have agreed in some instances upon the length of time necessary for such continued residence to work a presumption of such intent."

And, so while the Nationality Act of 1940 determines what acts are to be taken as evidence of such expatriation, it cannot exclude any other method by which one expresses an intent to reside in a foreign land without intent to return and to be a citizen of that country, and to express it in the way that country provides. This principle is established in International Law (*Santissima Trinidad*, 7 Wheat. 283; *Portier v. LeRoy*, 1 Yeates (Penn.) 371; *Jansen v. Vrow Christina Magdalena*, Bee. Adm. 11, 23; *sub nom. Talbot v. Jansen*, 3 Dall. 383; and see *United States v. Yasui*, 48 Fed. 40).

"There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.

"For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words

‘subject,’ ‘inhabitant,’ and ‘citizen’ have been used, and the choice between them is sometimes made to depend upon the form of Government. Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a Republican government, it was adopted by nearly all of the States upon their separation from Great Britain, and was afterwards adopted in the articles of Confederation and in the Constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a nation, and nothing more.”

Wait, C. J. *Minor v. Happersett*, 21 Wall. 165, 166.

“The United States may, by laws, fix or declare the conditions of citizenship within their territorial jurisdiction, and may confer the rights of citizenship everywhere upon persons who are not rightfully subject to the authority of any foreign Government; but they cannot, by undertaking to confer the rights of citizenship upon the subjects of a foreign nation, who have not come within their territory, interfere with the just rights of such nation to the government and control of its own subjects.”

13 Op., 89, Hoar, 1869.

It follows as a necessary corollary that any voluntary act of an American expressing an election to be accepted by another country as one of its citizens under its laws expatriates that person, under our settled doctrines and it is the foreign country which governs that election.

Perkins v. Elg, 307 U. S. 325;

Savorgnan v. United States, 94 L. Ed. (Adv) 203;

Atty. Gen. v. Ricketts, 165 F. 2d 193.

The Court Erred in the Exclusion of Evidence of the Mayor
of Suzuka City.

The trial court erred in failing to admit Exhibit CO for identification in evidence. This was the deposition of Ryuzo Sugimoto taken on the 27th day of April, 1948, pursuant to stipulation, and Mr. Sugimoto was the Mayor of Suzuka City, Miye Prefecture, Japan.

Kawakita testified as follows [p. 4384, line 15, to p. 4386, line 14]:

“Q. Mr. Kawakita, when did you decide to get your family name entered in the family register? Just what did you do? Where did you go? A. On March 8, 1943, I went with my uncle—his name is Yazaemon Kawakita, who was the head of the family koseki. I went with him to the Ishiyakushi office of Suzuka City Hall.

Q. And when you got there where did you go? A. We went to the registrar of the koseki of our family of our koseki, who took care of our koseki.

Q. What happened after you got there? A. My uncle told the registrar that this is my nephew and he desires to enter his name formally in the family koseki as a Japanese subject.

Q. What did the registrar say? A. The registrar said when I was born and I told him that I was born in September 26th, 1921.

Q. And what else was said or done at that time? A. He asked me—the registrar asked me if it was my desire to enter my name in the family koseki as a Japanese subject, and I told him yes.

Q. And then what happened? A. That was all—just a minute.

Q. Were some entries made? A. Yes. I gave them the date I was born and the place I was born

and I took the family seal and stamped it on the record.

Q. Then after that was done what happened? A. After that was done I had three copies, three or four copies of the Koseki Tohon made for me that I could register at the Tokyo police station for removal of my alien registration.

Q. And did you take a copy of them to the Tokyo police station? A. Yes, sir.

Q. And did you leave a copy there at the Tokyo police station? A. Yes, sir.

Q. After that did you also take a copy of this document to some other place, the place where you were going to work? A. Yes, sir."

Defendant's Exhibit CO was the official interpretation by the mayor of the city as to the legal effect of Kawakita's having registered his name in the Family Register. The foundation was laid as to the knowledge by the Mayor in this city of the legal effects of the entry of the name in the Family Register. The Mayor of the city is a magistrate who, as head of its city, is presumed to know the laws governing the city, and the procedure relating to an affair within the City Government. And he positively testified that he was familiar therewith.

In answer to questions propounded to him, he testified as follows [paragraph 5 to paragraph 12, incl., on page 2 of Exhibit CO]:

V.

"Q. Are you familiar with the laws relating to a Japanese head of the Family entering the names of those in his family as being Japanese nationals in the family register? A. Yes.

VI.

Q. If your answer is 'Yes,' state what those laws are. A. This law of Japan is known as Koseki-ho. This law governs the entry of the names of a family by the family head and the family register.

VII.

Q. State what the legal effect is of the head of a family entering the name of members of his family, including the nephew, in the family register. A. When the head of a family enters the name of members of his family including a nephew in the family register, this act of entry becomes a formal R. S. declaration that the member of the family so entered is a Japanese national.

VIII.

Q. Does such procedure conform to Japanese law that, when an uncle enters the name of his nephew in the family register at the request of the nephew residing in Japan, such entry constitutes a formal declaration of Japanese nationality according to Japanese law and procedure? A. Yes.

IX.

Q. Are you acquainted with the act of Yazaemon Kawakita, from the custodian of the records, wherein an entry was made by him in the official records of your Prefecture, that his nephew, Tomoya Kawakita, was born September 26, 1921, and that he wished on March 8, 1943, to declare himself to be a Japanese national, residing at 409 Uedamachi, Suzuka City, Miye Prefecture? A. Yes.

X.

Q. Did the entry of such name in your register constitute an official declaration of Japanese nation-

alty by Tomoya Kawakita according to Japanese law?

A. Yes.

XI.

Q. Did his having made this entry become an election, according to Japanese law, that he wished from that time on to be considered a Japanese national? A. Yes.

XII.

Q. Did this entry, according to Japanese law and practice, then subject him to all the rights and duties of Japanese nationality? A. Yes.”

Ryuzo Sugimoto was the Mayor of the township where Kawakita entered his name in the family Koseki. The Mayor stated he knew the laws and the procedure of his town and of his country. He is as much a qualified expert as is a lawyer. One does not have to be a member of the bar to know the laws. The President of the United States certainly knows the laws of this country and would be as much qualified to testify as would be the Attorney General as to certain laws, likewise a Mayor of a city. In New Jersey two members of the Supreme Court are laymen, not lawyers. The proper foundation for the Mayor's testimony was shown in the deposition itself. He was asked if he knew the laws and he stated that he did. There was no challenge to this statement and it must be taken as correct, therefore it was highly prejudicial for the court to exclude this document from the consideration of the jury.

The Court committed the following other errors in the admission and exclusion of evidence:

(1) *The Court Erred in the Admission of Evidence of Intent.* This constituted a wide inflammatory series of statements which we have set out in the Appendix to our brief, as page references. Each was objected to and it was stipulated that the objections might be deemed to go to all of the testimony thus referred to.

(2) *The Court erred in the admission of the Government's Exhibit 4-F, relating to the procedure and proceedings before the United States Consulate in Japan after the war ended to show that at that time the defendant overcame the presumption of expatriation.* This was entirely irrelevant to the issue of treason. It only showed that as far as that Administrative Officer is concerned that the defendant overcame a then existing presumption of expatriation. The conduct at that time was outside the sphere and scope of the indictment and could not relate back, but could only be confusing and misleading to the jury and since there was no evidence to establish the *corpus delicti*, namely, that Kawakita was an actual citizen of the United States, then owing allegiance to the United States, this testimony was irrelevant in its entirety and should not have been admitted. While we stipulated that the American Consul would testify, as set out in the documents, we did not admit that the testimony was relevant or material or competent to the trial itself.

(3) *The Court erred in permitting the prosecutor to cross-examine Kawakita based upon a statement secured from Kawakita by the F.B.I. [R. 2918-2966] but never introduced in evidence, following his unlawful arrest with-*

out a warrant. [R. 4243-4254.] The use of this statement was objected to and a cross-examination of Kawakita on the basis of his then statements were objected to as violating the defendant's constitutional rights. The objections, overruled should have been questioned.

The use of these statements for any purpose whatsoever was contrary to the decisions of the Supreme Court in the United States in *McNabb v. United States*, 318 U. S. 332; *Anderson v. United States*, 318 U. S. 350; *Silverthorne Lumber Company v. United States*, 251 U. S. 385; *Nardoni v. United States*, 308 U. S. 338; *United States v. Bayer & Radovich*, 331 U. S. 532; *United States v. Bayer*, 156 F. 2d 964; *Chambers v. Florida*, 309 U. S. 227, 84 L. Ed. 716; *Canty v. Alabama*, 309 U. S. 629, 84 L. Ed. 988; *White v. Texas*, 310 U. S. 530, 84 L. Ed. 1342; *Lomas v. Texas*, 313 U. S. 554, 85 L. Ed. 1513; *Ward v. Texas*, 316 U. S. 547, 86 L. Ed. 1663; *Ashcraft v. Tennessee*, 332 U. S. 143, 88 L. Ed. 1192; *Malinski v. New York*, 324 U. S. 401, 89 L. Ed. 1029.

The defendant would have been entitled to have the confession suppressed.

In re Fried, 161 F. 2d 453.

In *Silverthorne Lumber Company v. United States*, 351 U. S. 385, 64 L. Ed. 319 at page 321, Justice Holmes said:

“The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.”

Errors in Instructions Given.

THE COURT ERRED IN THE FOLLOWING INSTRUCTIONS GIVEN:

The Court gave the following instructions:

“It is stipulated that the defendant’s parents were born in Japan, and by reason thereof have always been Japanese nationals or subjects owing allegiance to Japan.

According to the law of Japan, the defendant himself, by reason of his Japanese parentage, was from birth a Japanese national or subject owing allegiance to Japan.

This conflict in the laws of the two countries gives rise to what is sometimes called ‘dual’ nationality or citizenship; which means, as applied to this case, that the defendant became an American citizen upon birth, according to our law, because born in the United States; and also became a Japanese national upon birth, according to Japanese law, because of his Japanese parentage.

Under our law, any American citizen of alien parentage may, on becoming of age, renounce his American citizenship and thus become a citizen of only the country of his parents.

The question for you to determine on this phase of the case from all the evidence is whether or not at any time prior to or during the period specified in the indictment, the defendant did renounce or abandon his American citizenship. . . .

Under our law an American citizen cannot owe ‘permanent allegiance’ to more than one country at any given time. That is to say, it is legally impossible for any American citizen to *owe conflicting al-*

legiance to any other country so long as he or she remains a citizen of the United States.” [Rep. Tr. pp. 5505-5506.]

This is an incorrect statement of the law and comes under our contention made heretofore, that a dual citizen residing in the country of one of his citizenships and presumptively expatriated from the citizenship of the United States under the circumstances of this case owed 100% allegiance to Japan. This is so because all he had, as far as the United States was concerned, was a presumptively *expatriated* citizenship in the United States. He had an actual Japanese citizenship and was residing in Japan. The court's instruction that it was legally impossible for any American citizen to owe conflicting allegiance to any other country so long as he or she remains a citizen of the United States was inconsistent and misleading to the jury. He at no time defined the liability of a presumptively expatriated citizen, one of the principal issues in the case (*Screws v. United States*, 89 L. ed. 1495, 325 U. S. 91; *Corson v. United States*, 147 F. 2d 437) and erroneously defined the duty of allegiance of a dual citizen.

A presumptively expatriated citizen of the United States still remains a citizen of the United States although during that presumptive period of expatriation his allegiance to the United States is in a state of suspense. Likewise a dual citizen residing in the other country of his citizenship and receiving protection from it, owes allegiance to that country. (*Perkins v. Elg*, 307 U. S. 325; *Carlisle v. U. S.*; *Savorgnan v. U. S.*, 94 L. Ed. (Adv. 203).

2. Likewise, the court, along similar line, erred in its instruction on page 5517 of the Reporter's Transcripts, lines 9 to 14, as follows:

"As stated before, the defendant was at liberty during his stay in Japan to renounce or abandon his American citizenship and with it all duty of allegiance to the United States. But unless and until he did so, the defendant owed *allegiance* under our law to his native country, the United States."

Again we state that this was an erroneous instruction, since the defendant was a Japanese citizen owing allegiance, therefore, to Japan and was presumptively expatriated under the Statutes of the United States and did not owe allegiance under our law to his native country *the United States* during that period.

3. The Court erred in giving the following instruction:

"Section 408 of the Nationality Act of 1940 (8 U. S. C. 808) provides in substance that 'loss of nationality . . . shall result solely from the performance by a national of the acts' specified in Section 401 which I have read to you. Section 410 provides that nothing in the Nationality Act of 1940 'shall be applied in contravention of the provisions of any treaty or convention to which the United States is a party upon October 14, 1940.' There was no treaty or convention between the United States and Japan in effect October 14, 1940, which made any provision with respect to citizenship or expatriation."⁷

As applied to this case, then, Section 408 means that the acts specified from time to time in Section

⁷The trial court omitted from the instruction the words "under this Act" and the Court substituted its own words "as applied to this case."

401 are the sole and exclusive methods whereby a born American citizen can exercise the right of expatriation, and thus lose American nationality or citizenship.

At all times therefore since the effective dates of the various provisions of Section 401 of the Nationality Act of 1940—that is to say, since January 13, 1941 with respect to subsections (a) to (h) inclusive, since July 1, 1944 with respect to subsection (i), and since September 27, 1944 with respect to subsection (j)—a born American citizen desiring to lose or terminate or discontinue American nationality or citizenship was required by our law to do voluntarily—of free will—one or more of the acts specified in subsections (a) to (j) inclusive of Sec. 401, thereby evidencing an intention to renounce or abandon American nationality and with it allegiance to the United States.” [Rep. Tr. p. 5511, line 22; p. 5512, line 25.]

The Court’s ruling and change of the language of the statute was error. The Nationality Act of 1940 was not intended by any means to repeal section 800 of Title 8, U. S. Codes, which declared the policy of the United States to permit expatriation of a citizen by any means of voluntary character which showed his clear intent to become a citizen of another country, and as viewed by that country’s laws.

United States v. Yasui, 48 Fed. 40.

The Court’s construction of this section, inherently and as construed and applied in this case, denies the constitutional and natural right inherent in any citizen to change his citizenship and is contrary to the fundamental policy

of this government frequently expressed since 1868 in various opinions of the Attorney General. * *United States v. Yasui*—Opinion of Judge James Alger Fee, 48 Fed. Supp. page 40, shows that Yasui, a dual citizen, had expressed an intent to become and to elect Japanese nationality, and had therefore lost his American nationality. While the *Yasui* case went to the Supreme Court of the United States and was reversed there on other grounds, this particular question was not passed upon and therefore still remains open.

4. The court erred in the following instructions given as to the overt acts:

“While two or more witnesses must testify to the same overt act, it is not required of course that their testimony be identical. Nor is it required that each witness testify to the whole of the act, since different witnesses may testify to different parts of the act. What is required is that, in order to establish an overt act of treason, the minimum proof necessary is that direct evidence of the overt act be given through the testimony of at least two witnesses, and that the jury be convinced beyond a reasonable doubt of the truth of such testimony

Direct evidence of any overt act charged in this case would necessarily consist of the testimony of eye witnesses who saw and heard the act done—saw the movement and heard the sound, if any, comprising the act. So the constitutional requirement is met only when, after considering the testimony given by all witnesses who testified as to an alleged overt act, the jury finds that the whole of such overt act—each movement and sound, if any, comprising the alleged act—is established as charged in the indictment by the testimony of at least two witnesses.

In order to convict the defendant of the crime of treason, it is not necessary that the prosecution prove every overt act charged. But it is essential that at least one of the overt acts charged in the indictment and remaining to be submitted for your consideration be proved by the direct testimony of *at least two witnesses*, and be so proved in its entirety as alleged in the indictment.

If you find that the prosecution has failed to prove beyond a reasonable doubt the commission by the defendant of at least one of the overt acts in its entirety as charged in the indictment by 'the testimony of two witnesses to the same overt act,' you must acquit the defendant.

On the other hand, if you should find from the evidence beyond a reasonable doubt that, while owing allegiance to the United States and while adhering to the enemies of the United States, the defendant did commit one or more of the overt acts alleged, and that such act or acts have been proved in entirety as charged in the indictment, by the 'testimony of two witnesses to the same overt act,' it would be your duty then to consider the fourth essential element of the charge." [Rep. Tr. p. 5521, line 23, to p. 5524, line 9.]

It is respectfully submitted that the *two-witness rule* is not correctly given in this instruction. Two witnesses are necessary to the overt acts, but the two witnesses, if in segments, must be sufficient to establish the precise segment of the overt act. Thus, if one witness testifies to a part of an overt act and another witness testifies to another part of the same overt act, there are not two direct witnesses to the same overt act if the testimony does not

establish the whole overt act and the instruction is therefore incorrectly given.

United States v. Robinson, 259 Fed. 685, 690;

United States v. Haupt, 330 U. S. 631;

Cramer v. United States, 325 U. S. 1.

As Wigmore states in Wigmore Op. Cit., Note 71, Sec. 2036, pages 263, 264:

“The object of the rule requiring two witnesses in treason is plain enough. It is as Sir William Blackstone said to ‘secure the subject from being sacrificed to fictitious conspiracies, which have been the engine of profligate and crafty politicians in all ages.’ ”

5. The Court erred in the following instruction:

“Article III, section 2 of the Constitution of the United States provides that: ‘The Trial of all Crimes . . . shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.’ ”

Pursuant to the power thus conferred by the Constitution, the Congress in 1790 enacted in substance what is today Section 102 of Title 28 of the United States Code, which provides that: ‘The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought.’ ”

It is the position of the appellant that in this offense that when Japan was conquered it became a part of the territory of the United States and was triable in Japan,

either by a court martial or by military commission (Winthrop Laws of War, Army Doc. 1001, page 778) or before the American Consulate. (Title 22, Secs. 141-5 and treaties with Japan (*supra*), and Appendix E.) That is the place where the witnesses were present and if any treason had been committed and was concealed by any of the Americans, or anyone attached to the case, it was *misprision* of treason in violation of Title 18, Section 3, U. S. Codes.

Congress did not intend these cases to be brought to some district in the United States where it was available to try the accused in a territory of the United States governed by the United States officials and subject to court martial or other procedure and proceedings. The defendant was not found in the United States but was in Japan; had reported to the military authorities, and was under the direct supervision and control of the American Army, even at the railroad station before he left. To state that he was "found in the United States" more than a year later when some former prisoner of war saw him in the United States is to belie the fact of this case and to stultify the law.

6. The Court erred in the following instruction:

"The punishment which the law provides for the offense charged in the indictment is a matter exclusively within the province of the court, and should not be considered in your deliberations in any way."
[Rep. Tr. p. 5545, lines 10-13.]

It is our contention that the court includes the jury and where the death penalty is involved the function of determining the penalty was for the jury and not the judge.

The Court Erred in Refusing the Following Proposed Defendant's Instructions.

“Defendant's Instruction No. 45:

You are instructed that the law recognizes dual-citizenship; that is to say that when a person born in the United States of Japanese parents, who cannot themselves become citizens of the United States and remain Japanese citizens, that the children are dual-citizens.” [Clk. Tr. p. 153.]

“Defendant's Instruction No. 46:

You are instructed that where a person is a citizen of two countries he owes paramount allegiance to the country of his residence and would even be guilty of the crime of treason if he was disloyal to that country. Therefore, you must find from the evidence in this case to which country Tomoya Kawakita owed paramount allegiance, and if you find that he owed such paramount allegiance to Japan at the time of the offenses charged in the indictment you must find accordingly, and acquit him.” [Clk. Tr. p. 154.]

“Defendant's Instruction No. 49:

A person born in one country of nationals of another, who acquire the nationality of the former by reason of the place of birth and that of the latter by reason of the nationality of the parents is in possession of what in law is called dual citizenship. Dual citizenship is not a theory or doctrine but is the unavoidable result of the conflicting laws of different countries. Under the American law of nationality, which is derived from the English law, American na-

tionality is based primarily upon the fact of birth within American territory and jurisdiction, whereas under Japanese law as it applies to this defendant, he acquired Japanese nationality through the birth of his parents in Japan.

Where one possesses a dual nationality, his paramount duties and loyalty are to the nation of his residence whether permanent or temporary. He owes allegiance to that country in which he is residing and which is given the shelter and protection of its own land and its own laws. He must obey the laws, rules and regulations of that country and where he has a duty of election he must elect to show that allegiance to the country of his residence. In time of war he is deemed by the laws of war and the laws of nations, as well as by the laws of the United States, to be an enemy for all purposes while he resides in that country, and since war suspends the ability of the country with which that nation is at war to give him any of the protection of citizenship, whatever rights of citizenship he has in the country of his non-residence are during the period of such war suspended." [Clk. Tr. p. 157.]

It was error to refuse this instruction (*Carlisle v. United States*):

"Defendant's Instruction No. 51:

You are instructed that the term 'Japanese subject' means any person who owes allegiance to the Emperor of Japan or to the Japanese Government." [Clk. Tr. p. 159.]

Our reasons are presented in the portions of the brief heretofore devoted to citizenship.

The Court Erred in Refusing the Following Numbered Instructions of the Defendant, Which We Refer to by Reference in the Clerk's Transcript:

Pages 112, 113, 114, 116, 117, 118, 119, 121, 122, 125, 126, 127, 128, 129, 130, 131, 132, 136, 137, 138, 139, 141, 145, 148, 149, 150, 153, 154, 157, 161, 168, 165, 172, 174, 175, 177, 178, 180, 181, 182, 183, 184, 185, 187, 188, 196, 197, 200, 201, 203, 205-a, 209, 210, 212, 214, 215, 217, 219, 221, 222, 224, 225, 226, 227, 228, 229, 230, 232, 233, 236, 238, 243, 245, 247, 250, 253, 255, 256, 257, 258, 259, 260, 261, 282, 277, 281, 267, 270, 272, 273, 275, 276.

All of these instructions bore on the various theories of the defendant in the case, and had been argued under the points already presented on the questions of dual citizenship; the questions of presumption of expatriation and other questions relating to the allegations of citizenship and treason.

We call the court's attention more specifically to three instructions, however. One of these was Proposed Defendant's Instruction No. 41 at page 149 and Proposed Defendant's Instruction No. 42 at page 150.

Particularly these relate to the burden of proof upon the Government to prove Kawakita's actual citizenship at the very time named in the indictment, to-wit, between August 8, 1944 and August 24, 1945, that Kawakita was actually a citizen of the United States and not a presumptively expatriated citizen.

Two other instructions which we offered, and which the court declined to give, we deem prejudicially erroneous.

We offered instruction No. 61, Clerk's Transcript 172, as follows:

"You are instructed that where a defendant asserts that he was at another place at the time of an alleged occurrence, what is necessary is for the evidence to raise in your mind a reasonable doubt as to the occurrence in order for you to find in favor of the defendant regarding that occurrence. Therefore, if you have a reasonable doubt whether the defendant was at a given place, at a given time, you must find in his favor regarding that occurrence."

This was, in effect, an alibi instruction and the manner and measure of a jury to weigh an alibi of the defendant. All that the testimony needs to do is to raise a reasonable doubt.

29 A. L. R. 1127-1128;

Glover v. United States (8th Circ. 147 Fed. 426);

McCook v. United States, 263 Fed. 55;

People v. Vasquez, 93 Cal. App. 448;

People v. Fong Ah Sing, 74 Cal. 253;

Falgout v. U. S. A., 279 Fed. 513.

In this case, as to the overt acts of punishment, which allegedly occurred after March 1, 1945, the testimony of the defendant was that he was working in the warehouse as a clerk, handling electrical supplies; that he did not finish his work until five o'clock in the afternoon, and did not leave the plant until after that time, and at no time was he at the camp itself except a few occasions when he helped Fujisawa interpret some letters and correspondence. This testimony is corroborated by document and by the records introduced by the Government itself as to the nature of

Kawakita's employment. This evidence was, therefore, in the nature of an alibi and the jury had to consider it under an appropriate alibi and the quantum of evidence which should have been considered. The court, nevertheless, declined to give this highly important instruction.

As to the other occurrences, Kawakita also denied his presence at any of the places mentioned. As to the Toland incident, the testimony of Dr. Bleich shows that Toland was not working on any ore rock but was on a garden detail from April 21, 1945, on to the close of the war, and therefore Kawakita could not be at that place.

It was the defendant's right to have this instruction given by the defendant as follows, being Defendant's Instruction 159, on Clerk's Transcript page 277, as follows:

"Evidence that a witness has been insane affects the credibility of such witness. Such insanity is presumed to continue unless shown to have been overcome.

If you find that any witness in this case has been or was insane then you may reject the whole of the testimony of such witness on the grounds of his insanity."

Jones Commentaries on Evidence, page 4893, Sec. 2470;

Holcomb v. Holcomb, 28 Conn. 177;

State v. Kelly, 57 N. H. 549;

Worthington v. Menther, 96 Ala. 310, 17 A. L. R. 407, 7 So. 72;

1 Wharton's Evidence, Third Ed. 403;

Coleman v. Commonwealth, 25 Grath 865, 18 Am. Rep. 711.

In a letter to counsel for the appellant a captain in the American Army, assigned to duty in the war crimes trials in Japan, wrote in part as follows:

“Most prisoners of war witnesses still suffer a psychosis which causes them to indulge in a melodramatic self heroism. In my opinion it is a perversion of self pity. I feel free to venture this ‘calloused’ view since I have spent five years in the Army (2 of them overseas), and my study of POW conditions in Japan establishes that although their lot was a poor one much of the ‘horrors’ were highly exaggerated and the result of their own deportment.

“Your failure to see ‘war atrocities’ as treason is shared in by many of my associates here and we all have lived with these problems for some time. You would also be amazed to learn what attitude we have taken toward prisoner of war witnesses. In the initial stage of this war crimes program our approach to these men was indulgent. It wasn’t until we discovered that this ‘self heroism’ caused constant exaggeration tantamount to lies. With that revelation our records are replete with vigorous cross-examination of these witnesses, and in a great majority of instances brought about voluntary refutation.”

This letter expresses so admirably the situation and the jury had a right to consider the psychiatric treatment given to these prisoners of war witnesses on their return to the United States, and regarding which many of them testified.

We also wish to call to the court’s attention Defendant’s Proposed Instruction No. 84, Clerk’s Transcript page 200, in which we ask the court to instruct the jury that the means set out in Section 801 of the Nationality Act are not the exclusive methods of losing one’s nationality. That expatriation is a matter of intent on the part of the person

concerned, which intent may be shown by some express act, or some other act from which it can be gathered and that:

“Any act or declaration on the part of the defendant from which you can determine that he intended to expatriate himself is sufficient to justify a finding of expatriation, and if you so find you must acquit him.”

The court declined to give this instruction and gave one stating to the jury that the sole means of losing one's nationality were set out in Section 801 of the Nationality Act—a point we have heretofore argued at length.

We call attention of the Court, also, to our Motion, pages 106, 107, 108, of the Clerk's Transcript, challenging the constitutionality of that act as construed and applied by the court in the instant case.

We think that if the court had had before it the Legislative history and discussions regarding Section 801 of the Nationality Act, which pointed out the reason for the limitation of the act as applying solely to that section, it would not have given the instruction requested by the government and would not have declined to have given the instruction which we requested and which was refused.

The refusal of this instruction is also contrary to the case of *Perkins v. Elg*, 306 U. S. 325; *Savorgnan v. United States*, 94 L. Ed. (Adv.) 203.

The court also erred in refusing to give the jury a definition of the word “comfort” as requested by the defendant in an instruction, No. 149 at page 267 of the Clerk's Transcript. The word “comfort” connotes knowledge on the part of the enemy government that was to be comforted by the act or thing done and we think it was essential for the jury to be so informed.

One instruction was offered by the defendant, Instruction No. 157 on page 275 Clerk's Transcript, on the right of election, which the court also declined.

Several instructions were offered by the defendant regarding the term and definition of the word "allegiance" which the court declined.

While the jury was deliberating, it sent in a request for a definition of the word "betray." The defendant proffered a Webster's complete dictionary definition of the word "betray" in the light of the request of the jury. This was filed at 3:49 P. M. August 31, 1948. [Clk. Tr. 284.] The instruction was refused. It was the right of the jury to have a complete Webster's Dictionary definition of the word "betray," which apparently was bothering the jury on this date—three days before it came in. No satisfactory definition of betrayal was given to the jury, but this definition showing that treason required *betrayal or to deliver into the hands of the enemy by treachery or fraud, in violation of trust; to prove faithless or treacherous to, as to a trust or trusts; to mislead; to reveal; to disclose in violation of a confidence*, were essential definitions because Kawakita at that time did not have a trust which he could betray to the Japanese government and none of his acts constituted "betrayal" in the sense in which that word is defined.

The defendant also tendered Defendant's Instruction 62-a, page 174 of the Clerk's Transcript, regarding the method of considering overt acts—that they cannot be partly proved and partly disproved. It was a highly essential instruction to be given in the light of the variance of the different witnesses who themselves disproved parts of the overt acts in the case.

IV.

The Trial Court Erred in Denying the Defendant the Right to Inspect the Minutes of the Grand Jury and the Right to Question the Foreman of the Grand Jury Regarding the Return of the Indictment.

At the outset of the case, an effort was made to determine whether the indictment had been returned on sufficient evidence; that is to say, on the testimony of two witnesses to an overt act. [Rep. Tr. June 27, 1947, pp. 38 *et seq.*] This was partly occasioned by reason of the fact that the complaint against the petitioner before the United States Commissioner was based on an affidavit of hearsay information solely of F.B.I. Agent Sawtelle, who had never been in Japan. The trial court denied the motion to inspect the minutes of the Grand Jury, and refused to allow the foreman of the Grand Jury to be questioned.

Rule 6 of the Rules of Criminal Procedure, however, adopted by the Supreme Court of the United States, permit a jury to be questioned,

“upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.”

The Fourth Amendment to the Constitution of the United States provides as follows:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

Therefore, the accused has the right to question the legality of his arrest and whether there is any probable cause for his seizure. The constitutional requirement of *two* witnesses to an overt act in furtherance of an intent to betray is essential.

The mere statement of an F.B.I. Agent and an affidavit on information and belief would not be sufficient.

Furthermore, since a superseding indictment was brought, it was a different indictment and requires the same kind of evidence as did the former indictment. And, the indictment required at least twelve votes for all who heard all of the testimony relating to the alleged crimes. Since an indictment had been returned, there was no reason for secrecy surrounding these events and the Rules of Criminal Procedure specifically permit such an inquiry.

Kawakita had been arrested without a warrant. The only complaint filed against him was by an F.B.I. Agent. The arrest could not be justified nor could a Grand Jury indictment be justified if it was without probable cause.

United States v. Di Re, 332 U. S. 581, 92 L. Ed. 210.

Kawakita had not been told why he was arrested in accordance with the requirement of California State Law. (See Section 841, California Penal Code; *United States v. Di Re*, 332 U. S. 588; *Bad Elk v. United States*, 177 U. S. 529.)

We challenged the arrest, in the courts below, as illegal. [R. 2954.] Thereafter, Kawakita was taken to the Bureau and held for two hours before being arraigned before a Magistrate. He was thereafter questioned and made a statement to F.B.I. Agent. The statement itself was not introduced in evidence. [R. 4244-59; 4384-8.]

The Court, over objections of the defendant, permitted the Government to cross-examine the defendant from the statement thus secured, and to impeach him in the trial from the illegally gotten statement, which was done over objection and violated the defendant's constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States. [R. 4242, 4254, 4263 J.] The Court overruled the objections.

V.

The Trial Court Erred in Permitting Fourteen Jurors to Sit Throughout the Trial of the Case.

The appellant, at the outset, challenged the right to have two alternate jurors set in the case. Juries in the courts of the United States are tried according to the principle of common law.

The conception of trial by jury in our Anglo American system is so that certain elements have long been regarded as of its essence.

1. The term jury denotes a body of twelve—no more and no less. Learned judges have, indeed, sometimes permitted themselves to say that Magna Carta guaranteed the right to trial by twelve jurors. (*Thompson v. Utah*, 170 U. S. 343, 349, 42 L. Ed. 1061.) At the beginning of the Thirteenth Century, twelve was indeed the usual but not the invariable number. (Thayer, Evidence, 85.)*

*The importance of the number is dwelt upon by Lord Coke, who says: "And it seemeth to me that the law in this case delighteth herself in the number of twelve. . . . The number of twelve is much respected in Holy Writ, as twelve apostles, twelve stones, twelve tribes, *et seq.*" Cole. Litt. 155 A. See also Somers, The Security of Englishmen's Lives, 94 (Harvard Law School 1126, Jefferson Works 5102).

Trial by jury is a trial by twelve men, no more, no less —not fourteen.

Capital Traction Co. v. Hof, 174 U. S. 873, 43 L. Ed. p. 881.

The selection of two alternates makes the jury fourteen and not twelve. It is idle to say that these two extra persons associating as they do with the other twelve, do not discuss evidence or other matters and do not have a weighty influence on the jury. Jurors are human and the whole issue must be left to but twelve jurors.

It was therefore error not to refuse to discharge the two alternate jurors and to maintain a jury of fourteen throughout the trial.

VI.

A. The Verdict Was Illegally Obtained Through Coercion. The Verdict and Judgment Are Therefore Null and Void, as Violative of Due Process of Law Guaranteed by the Fifth Amendment to the Constitution of the United States.

The jurors were sent out to deliberate on August 25, 1948. The weather was extremely hot. [Deft. Ex. 1 on Motion for New Trial.] The jury was confined in a small jury room without benefit of any air conditioning, fans, or other things. The janitors brought plenty of towels. The jury had been in charge of four deputy marshals from the United States Marshal's office. On the morning they were sent out to deliberate a crier from Judge Harrison's court was obtained by the trial judge to take charge of the jury. This was Mr. John Scheibe, who was formerly an officer in the United States Navy.

On August 26, 1948, Mr. Scheibe brought the court a note from the jury to refer to some testimony. One of the jurors wanted the testimony of Montgomery on the subject of Overt Act (b) as alleged. The court so stipulated that Montgomery did not testify at all as to Overt Act (b). The testimony of *Fujisawa* was read to the jury, as requested, from page 3585, line 15, page 3644, line 12.

Three days passed without any event and on August 29, 1948 at 3:20 P. M. the court informed counsel that

“The bailiff has brought me a further communication from the jury which reads as follows:

‘The jury is unable to arrive at a verdict. A majority of the jury feel there is no probability of doing so.

(Signed) Wm. W. Andrews, Foreman.’”

The court then proposed to call the jury in and give them an instruction such as was given in *Alice v. United States*, reported in *Allen v. United States*, 164 U. S. 492, at 501. Defense counsel objected to the proposed instruction, and also stated:

“I would oppose any instruction being given to the jury at this time. I think that any comment your Honor would make now would be in the nature of compulsion.”

Defendant counsel also moved to discharge the jury but in the absence of discharging the jury stated that if the court wanted to keep them for further deliberation to do so without further comment. It was agreed that the jury might be informed that the court wished them to deliberate

further without additional comment. The court at that time stated:

“Mr. Lavine’s position is, as I understand it, that there might be some coercion effected in making any additional comment to the jury at this time above merely sending them word that the court expects them to deliberate further.”

The court then sent them word to continue further deliberation.

On Monday, August 30th, the jury deliberated for a considerable period of time. Court reconvened and the following proceedings occurred:

“The Court: The bailiff has brought me a further communication from the jury which reads as follows:

‘The Foreman, personally, respectfully requests permission to approach the bench, or other similar action, for the reason of securing aid and advice of the Court, on a matter of procedure, concerning the proper deliberating of the jury. This matter is, in my belief serious and I am supported in that belief by other members of the jury. The Court’s consideration of this request will be appreciated, and of help.

(Signed) Wm. W. Andrews, Foreman.’

Have counsel any suggestions before the jury be brought?

Mr. Lavine: None, your Honor, except that I think now, since their note of last Saturday and their further deliberations this morning, any further deliberation would be in the nature of compulsion, and I therefore move that the jury be discharged. I make that motion in their absence.

The Court: The motion is denied. I understood your motion made Saturday and I understand your view. You would like to have them discharged. I appreciate that, but this has been a long case and they are asked a great many questions to answer and they have not asked to be discharged yet."

The jury was called back into court and the following proceedings took place:

"The Court: Members of the jury, I have received a further communication from the foreman which reads as follows:

'The Foreman, personally, respectfully requests permission to approach the bench, or other similar action, for the reason of securing aid and advice of the Court, on a matter of procedure, concerning the proper deliberating of this jury. This matter is, in my belief serious and I am supported in that belief by other members of the jury. The Court's consideration of this request will be appreciated, and of help.

(Signed) Wm. W. Andrews, Foreman.'

Before anything is said I want to caution you again: The court is not interested until you have reached unanimous agreement in hearing anything about how the jury stands numerically or otherwise, as I told you at the time the case was given to you. So in anything that is said, I want to caution you against any statement of any kind as to how you stand numerically or in any other manner.

What is the question as to procedure?

'The Foreman: Your Honor, it is my belief that we have a juror here who is impeding justice.

The Court: Now, I don't want to hear anything about it. That is indicating how you stand.

The Foreman: Your Honor, it is not—

The Court: It is a question of the procedure.

The Foreman: It does not indicate how we stand.

The Court: Very well. Perhaps I am too hasty.

The Foreman: There are other members. We are not 11 to 1 or anything else.

The Court: I don't want to hear anything about how you stand.

The Foreman: I understand. Excuse me, please, your Honor.

The Court: Proceed, please, Mr. Foreman.

The Foreman: I believe that this juror is impeding justice, interfering with the course of this trial, and making it so that this jury will never and can never arrive at a verdict; and that we are kept there, not only unable to proceed, but with this person who is personally objectionable to some members of the jury.

The Court: Is that the question?" "

The Court then gave them the further instruction to try to agree and suggested that they retire and deliberate further.

The foreman of the jury, Mr. Andrews, on Monday asked that the jury be polled on an opinion of this because he felt that it was utterly impossible and the feeling in the jury room was high as "there is a personal animosity there that could possibly be dangerous."

The Court said that it won't help to poll the jury. "I don't even know the question you wish to be polled upon."

"The Foreman: We wish to be excused. We feel that we cannot arrive a verdict and the jury has been polled."

Defense counsel then requested that the jury be polled on that question, which request was denied. Juror Clancy spoke. He said, "We have been locked up five nights and five days and we have not accomplished a thing and we never will. There is animosity crept in and there is everything crept in." He said, in answer to the Court's inquiry, that it was impossible for the jury to agree upon a single answer to any one of the 104 questions propounded.

Juror Sidle said he had been on many juries and that every question had been discussed. "We approached it from every angle. There isn't an angle that I can think of that could be approached that would bring about, as we feel, any positive result or agreement. We agree and not agree, and we just can't get anywhere with a situation, in the slang phrase 'hung up.' That is what we are up against." After stating that they had devoted all their energies and studied it from every angle, he continued: "It has gotten to the point where, personally, I feel that there is absolutely nothing can be done. Of course, if the Court has anything or could do anything to help—but I understand. I am willing to go ahead as long as my energies will hold up."

The Court discussed the subject further with the jury, making, among other remarks:

“You are the sole judges of how you shall deliberate, and while the court may keep you deliberating, the court can’t make you deliberate. It is the old story: You can ride a horse to the water, but you can’t make him drink.

When a situation like this is reached, the court tries to be of assistance to the jury. Frequently the position is made—and in many instances, perhaps, properly so—that the court is attempting to coerce the jury or to force the jury to arrive at a verdict.”

The Court then gave jury a further instruction that it was their duty to agree, unless it would do violence to their individual judgments, and by the minority to have a disposition to be convinced by the majority. We will discuss this more fully.

After further discussion, the Court asked if the jury wished any further suggestions, whereupon the *foreman* said:

“I still insist, Your Honor, that it is utterly impossible. Persons of ordinary and reasonable intelligence could discuss things and arrive at any point—

The Court: That was not my question. My question was: Do you want any further suggestions from the court?

The Foreman: I renew my request that the jury be dismissed, Your Honor.”

Whereupon, Mrs. Ziegler, a woman juror, raised her hand and the Court said:

“The Court: Who was it had up their hand? Mrs. Ziegler, do you have something?”

Juror Ziegler: Perhaps not. May I, Your Honor?

The Court: Yes; you may.

Juror Ziegler: Would it be out of form to have a new foreman? Mr. Andrews has not been well over the week end and somebody else has not.

The Court: You are entitled to elect your own foreman at any time.

Juror Ziegler: That would not help any.

The Foreman: I might say that the lady nominated me for foreman, Your Honor.

Juror Ziegler: Yes; I did.”

The Court then gave an instruction to the jurors which we will hereafter quote in full and attack. Thereupon, Foreman Andrews, after the instruction to the jury, again stated to the Court:

“The Foreman: May I be heard further, Your Honor? I think the court does not understand the point that I raise. No one here objects to which way any juror voted, but the manner and statements made indicate to us this long time that it is going to be utterly impossible to complete this. It is not—no one here objects to any way or which way.

The Court: I understand that, Mr. Andrews.

The Foreman: I was not trying to state how the jury stood. But there is one question—

The Court: But sometimes, when people differ with us, that affects our opinion of them, you know.

The Foreman: I understand that, but as time goes by, it seems to me that sufficient time has gone by. That is my personal opinion and I have a great hesitancy for returning to the jury room.

The Court: Well, Mr. Andrews, you are a lawyer. Let me suggest to you that maybe you are able to arrive at your conclusion in some of these matters more rapidly by reason of your legal training. It may be necessary for some of the others to catch up with you.

The Foreman: I am not alone, sir.

The Court: Well, that may be true, too.

Mr. Lavine: I again renew my request, Your Honor, in view of that statement, to discharge the jury.

The Court: Do you have something further, Mrs. Ziegler? You raised your hand.

Juror Ziegler: I don't feel like going out under the circumstances; I really don't.

The Court: It is very difficult, ladies and gentlemen of the jury, to the court to feel that you have completed your deliberations to the extent that you could under the court's instructions and not be able to arrive at a unanimous answer to one of the 104 questions presented to you. That may be the case.

It has been a long trial, as I say, and I know you are tired and you would like to be done with it. But in all the circumstances which have been mentioned here, I would ask you to deliberate further, to try further to see if you can't come to a **unanimous agreement**. If you can't answer all the questions, answer as many as you can. And, remember, again, that no juror is expected to surrender his honest convictions if, after full deliberation and attention to

the views of his or her fellow jurors, he or she remains convinced of the correctness of his or her stand on any matter involved.

You may now retire.”

Three days later the jury came in with a general verdict of guilty, and a finding against the appellant of eight of the overt acts. The jurors were thoroughly exhausted and on the verge of nervous collapse. Such a verdict is coercive.

The length of time within which the jury may be held to deliberate has been the subject of frequent discussion and coercive verdicts are in violation of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States, as denying a fair trial to the accused, since the deliberation and determination of the questions of innocence or guilt are equally due process questions.

In some states it has been held by statute that where a jury twice requests that it be discharged that it is mandatory to discharge them and a failure to do so is reversible error.

The following four states have held by statute directing deliberation of the jury, as follows:

“In *Florida, Maine, South Carolina* and *Wisconsin* there are statutes regulating the number of times a trial court may send a disagreeing jury back for further deliberation. The status in Wisconsin and South Carolina are identical, as follows: ‘When a jury after due and thorough deliberation upon any cause shall return into court without having agreed

on a verdict, the court may state anew the evidence or any part of it and may explain to them anew the law applicable to the case, and may send them out again for further deliberation; but if they shall return a second time without having agreed on a verdict, they shall not be sent out again without their own consent, unless they shall ask from the court some further explanation of the law.' (Code of Laws, S. Car. 1902, §2949; Wis. Stat. 1898, §2855.) In Florida the statute is the same, except that it omits the words 'may state anew the evidence or any part of it.' Rev. Stat. Fla. 1892, §1093. In Maine the wording is somewhat different. The statute provides as follows: 'When a jury, not having agreed, return into court stating the fact, the justice may, in his discretion, explain any questions of law, if proposed to him, or restate any particular testimony, and send them out again for further consideration; but they shall not be sent out a third time in consequence of their disagreement, unless on account of difficulties not stated when they first came into court.' Rev. Stat. Maine 1903, c. 84, §100."

"In *State v. Kelley*, 45 S. Car. 659, 24 S. E. Rep. 45, the jury had been kept together twenty-four hours, during which time they had made repeated attempts to communicate with the judge. Finally they were brought into court and told the judge that it was impossible for them to agree, whereupon he sent them back for further deliberation. One of the jurors protested against being sent back. The Supreme Court held that the statute had been violated, and granted a new trial."

American & English Annotated cases, Volume 11,
p. 1132;

State v. Place, 29 S. Dak. 489.

South Carolina:

1902: Code of Laws, 1902, sec. 2949;

1942: Latest statute regarding same subject matter is Code of Laws, sec. 642, 1942. (1932 Code, sec. 642; Civ. P. 1922, sec. 582; Civ. C. 1912, sec. 4050; Civ. C. 1902, sec. 2994; G. S. 2268; R. S. 2409; 1797(5) 358.)

State v. Stephenson, 1898, 54 S. C. 234, 32 S. E. 305, 11 L. R. A. (N. S.) 178: Juries may not be coerced in this state by confinement . . .;

Florida:

Rev. St. Fla., 1892, sec. 1093.

Statute applies to both civil and criminal cases. (*Adams v. State*, 34 Fla. 185, 15 So. 905; *Lambright v. State*, 34 Fla. 564, 16 So. 582—1894 cases.)

While sections 1093 and 2925 Rev. Stats. (secs. 4368, 8402 Comp. Gen. Laws, 1927), confer the legal right upon juries to be discharged where the circumstances therein mentioned exist, they were not designed to abridge in any way the judicial discretion vested in the judge to order such discharge whenever a proper case is presented for the exercise of such discretion, even though the circumstances warranting such discharge are not such as invest juries themselves, under the statute, with the right to demand their discharge. (Citing *Smith v. State*, 40 Fla. 203, 23 So. 854; *Tervin v. State*, 37 Fla. 396, 20 So. 551—1896 cases.)

Remark: The Florida statute is as of 1934 according to the Florida Digest; the So. Carolina statute is as of 1942.

Wisconsin:

Statutes, 1898, Sec. 2855.

Maine:

Rev. St. Maine, 1903, c. 84, sec. 100.

Such statutory mandate shows the legislative view of what constitutes coercion in obtaining the verdict of the jury.

“A verdict based upon any other method than by the exercise of the full and free judgment of the individual jurors and the weighing of the evidence is invalid. It is regarded as coercive conduct for the court to threaten to keep the jury in long continued confinement.”

People v. Sheldon, 155 N. Y. 268, 53 N. E. 841, 41 L. R. A. 644.

See:

People v. Walker, 209 P. 2d 834 at 838.

In *State v. Bybee*, 17 Kan. 462, the court said:

“ ‘A verdict is the expression of the concurrence of individual judgments, rather than the product of mixed thoughts. It is not the theory of jury trials that the individual conclusions of the jurors should be added up, the sum divided by twelve, and the quotient declared the verdict, but that from the testimony each individual juror should be led to the same conclusion; and this unanimous conclusion of twelve different minds is the certainty of fact sought in the law.’ It may be said that any act or instruction of a trial court, which tends to violate this theory of a verdict, amounts to coercion.”

In *People v. Sheldon*, 41 L. R. A. 644, the court held that:

“The old rule permitting coercion of a jury in order to secure a verdict has been swept away, and under our present method the independence of a jury is respected.”

The court, in that case, which was decided July 7, 1898, quoted from *People v. Olcott*, 2 Johns. Cas. 301, 1 Am. Dec. 168, where Mr. Justice Kent, in an opinion reviewing prior cases at length paid his respect to the rule formerly existing of compelling an agreement of the jury, said:

“‘The doctrine of compelling a jury to unanimity by the pains of hunger and fatigue, so that the verdict in fact be founded, not on temperate discussion and clear conviction, but on strength of body, is a monstrous doctrine, but does not . . . stand with conscience, but is altogether repugnant to a sense of humanity and justice. A verdict of acquittal or conviction, obtained under such circumstances, can never receive the sanction of public opinion. And the practice of former times of sending the jury in carts from one assize to another, is properly controlled by the improved manners and sentiments of the present day’.”

It is the duty of the court to discharge the jury if they do not agree after all of the views of the several jurors are expressed and presented in the different forms and individual opinions of the jurors are fully and conscientiously made up.

People v. Faber, 199 N. Y. 256, 92 N. E. 674.

A trial judge must not either expressly or by any act or language state anything which will carry an implication as to how long he intends to keep the jury deliberating.

Waite v. Mississippi, 124 So. 803;

Stewart v. United States, 300 Fed. 769;

Dudley v. State, 113 S. E. 24, 28 Ga. App. 711;

People v. Davidian, 20 Cal. App. 2d 720.

“Charge held to be coercive.”

People v. Demeaux, 160 N. W. 634, 194 Mich. 18;

People v. Curtis, 98 P. 2d 228;

Brasfield v. United States, 272 U. S. 448, 71 L. Ed. 345;

Jordan v. United States, 22 F. 2d 966;

23 Corpus Juris Secundum, Sec. 1043, 612 La. 98, 135 S. W. 2d 111;

People v. Bruneman, 4 Cal. App. 2d 75, 42 P. 2d 891.

In *Bollenbach v. United States*, 326 U. S. 607, 90 L. Ed. 354, the court said:

“‘The influence of the trial judge on the jury is necessarily and properly of great weight,’ *Starr v. United States*, 153 U. S. 614, 626, 38 L. Ed. 841, 845, 14 S. Ct. 919, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge’s last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge.

“An experienced trial judge should have realized that such a long wrangle in the jury room as

occurred in this case would leave the jury in a state of frayed nerves and fatigued attention, with the desire to go home and escape overnight detention, particularly in view of a plain hint from the judge that a verdict ought to be forthcoming."

To keep the jury deliberating under these circumstances in the heat and struggle that then existed was a violation of every fundamental right of the accused. It violated his right to fair trial under the Fifth Amendment to the Constitution of the United States.

B. The Court Erred in the Instructions Given While the Jury Was Deliberating.

The Court gave the following instruction to the jury on August, after agreeing with counsel on August that it should give no instructions. But, two days later, the Court gave the following instruction:

"The Court: Let us not get into that. These personalities do not have anything at all to do with the court—and these personal relationships sometimes are the things that keep us from being open-minded and arriving at a verdict.

The Court wishes to suggest a few thoughts which you may wish to consider along with your consideration of the evidence and all the instructions previously given you.

This is an important case. The trial has been long and expensive. If you should fail to agree on a verdict, the case is left open and undecided. Like all cases, it must be disposed of sometime. There appears no reason to believe that another trial would not be equally long and expensive; nor does there appear

any reason to believe that the case can be again tried any more exhaustively than it has been on the part of either side.

Any future jury must be selected in the same manner and from the same source as you have been chosen. So there appears to be no reason to believe that the case would ever be submitted to twelve men and women more intelligent, more impartial, more competent to decide it, or that more or clearer evidence could be produced on the part of either side.

As I told you at the time I instructed you, it is rarely possible to prove or disprove, either way—it is rarely possible to prove or disprove anything to an absolute certainty.

Upon brief reflection, the matters I have mentioned suggest themselves, of course, to all of us who have sat through this trial. The only reason they are mentioned is because some of them may have escaped your attention, which must have been fully occupied in your consideration of all the evidence up to this time. These are matters which, along with other and perhaps more obvious ones, remind us of the desirability that you give the jury's *unanimous* answer to the questions asked on the 13 forms of special verdict submitted, and that you *unanimously agree* upon a general verdict of guilty or not guilty if you can do so without violence to your individual judgment and your conscience.

It is unnecessary for me to say again that the court does not wish any juror to surrender his or her conscientious convictions. As I stated at the time the case was submitted to you, do not surrender your honest convictions as to the weight or effect of evidence solely because of the opinion of other jurors, or for the mere purpose of arriving at a verdict.

As I said at the time, also, it is your duty as jurors, however, to consult with one another, and to *deliberate with a view of reaching an agreement* if you can do so without violence to individual judgment.

Each of you must decide the case for yourself, but you should do so only after a consideration of the evidence with your fellow jurors. And in the course of the deliberations you should not hesitate to change an opinion when convinced it is erroneous. And certainly a juror should never hesitate to change his opinion by reason of personalities, if they are convinced from the evidence *and from the arguments made in the jury room* that the opinion they had previously held is erroneous.

In order to bring 12 minds to *unanimous* results, you must examine the questions submitted to you with candor and frankness, and with proper regard and deference to the opinion of each other. That is to say, in conferring together you should pay due attention and respect to each others opinions and listen to each others arguments with a disposition and open-minded—*a disposition to be convinced*. If the much larger number of you are for a conviction, each dissenting juror should consider whether a *doubt in his or her own mind is a reasonable one*, since it makes no effective impression upon the minds of so many equally honest, equally intelligent fellow jurors who have heard the same evidence, with the same attention and with an equal desire to arrive at the truth and under the sanction of the same oath.

On the other hand, if a majority or any substantial number of you are for acquittal, the other jurors ought seriously to ask themselves again whether they do not have reason to doubt the correctness of a

judgment which is not concurred in by many of their fellows:

Mr. Lavine: Had your Honor concluded?

The Court: No. The court and the jury are here to come to a just and righteous result in this case. You are as anxious to reach that result, I know, as I am.

As I have stated to you before, you are not partisans. You are judges—judges of the facts and your sole purpose is to ascertain the truth as to the facts from the evidence, and in ascertaining the truth as to the facts you are the sole and exclusive judges.

You must know it by heart by now. You are the sole and exclusive judges of the credibility of the witnesses and the weight and effect of all the evidence, and in the performance of your duties you are entitled to disregard, disregard entirely all comments of the court and counsel in reaching your own judgment and in making your own findings as to the truth as to the facts.

Let me repeat again so that you will not feel that any remarks I have made are intended to put any coercion or pressure upon you: No juror is expected to yield a conscientious conviction he or she may have as to the credibility of any witness or as to the weight or effect of any evidence, *but, as I have previously said, it is your duty, members of the jury, to agree, unless after a full and impartial consideration of all the evidence with your fellow jurors, to agree would do violence to your individual judgment and conscience.*

There has been some suggestion here—there was Friday—that some of you were very tired. Perhaps I should have suggested to you at the outset that you

may be as leisurely in your deliberations as the occasion and circumstances may require. Sometimes jurors may fail to agree because they hurry too much to try to agree. Sometimes people do that.

I do not speak in any critical vein. We are dealing with an attempt to get 12 human beings to arrive at a common conclusion as to the truth.

You will remember at all times if any doubt remains in your mind, any reasonable doubt, as to the guilt, the defendant is entitled to your verdict of acquittal.

The bailiffs have been instructed to take you to your meals whenever you wish to go, to take you to your hotel whenever you wish to go. You are to take all the time you may feel necessary for your deliberations.

You may now retire and continue your deliberations as your good and conscientious judgment as reasonable men and women may determine.” (Emphasis ours.) [R. 5627-5633.]

In the setting of this case, such an instruction was positively reversible error and has been condemned in this Court in *Peterson v. United States*, 213 Fed. 920, C. C. A. 9.

For six days the jury had deliberated and had reached a conclusion as to their own individual opinion. To request the dissenting jurors at that time to consider whether a doubt in his or her mind was a reasonable one—when that juror had had a reasonable doubt for six days—was to ask the surrender of one’s individual opinions, and to use the language of the instruction

“a disposition to be convinced”

•

even against one's own conviction. Such an instruction at that time denied fair trial to the accused and is prejudicial error.

The Court, in another phase of its instruction said:

“No juror is expected to yield a conscientious conviction he or she may have as to the credibility of any witness or as to the weight or effect of any evidence, but, as I have previously said *it is your duty, members of the jury, to agree*, unless after a full and impartial consideration of all the evidence with your fellow jurors to agree would do violence to your individual judgment and conscience.”

We know of no law or rule that makes it a duty of a juror to agree upon a verdict nor to agree lest it would do violence to their individual judgment and conscience. The duty of a juror is to reach a true and correct result, whether they agree or not with the other jurors. It was a mandate to the jury of coercion; it was the language of command they had to agree, and that language was obeyed for fear of its possible consequences.

Even in the face of this language, the foreman of the jury protested.

The trial court erred in instructing the jury that it was their *duty* to agree upon a unanimous verdict if they could.

This court held such language to be error in *Peterson v. United States*, 213 Fed. 920, 924 (C. C. A. 9), wherein this court said as follows:

“Turning now to another instruction complained of. It seems that the jury first retired to consider of their verdict on Friday afternoon, and, after being out for

some time, they returned into court for further instructions, which were given. They again retired, and, after remaining out all night, came into court about 11 o'clock Saturday morning, and, through their foreman, reported that they had agreed as to the defendant Walter Peterson, but were unable to agree as to the other two. Thereupon the following statement was made to them by the court:

‘The court at this time declines to receive a verdict as to one defendant. The case should be finally disposed of as to all. This is, as you know, the second trial. To try it again means to try it before a jury drawn from the same community that you have been, and with no reason to believe that they would be any more intelligent or honest than you are or any more likely to arrive at a verdict. Justice to both parties demands that the case be brought to an end. The expense of these trials is very great; possibly the expense of the parties so far incurred is from \$7,000 to \$10,000. The government has a right to a verdict without further expenditure of time and money. The defendants, if guilty, have a right to have the fact determined by a verdict before they are bankrupt in pocket, and likewise if they are innocent they have the right to be acquitted before their means are exhausted. You state, in answer to the court’s question, that you stand seven to five. If seven are for an acquittal, the five should seriously inquire whether there is not a reasonable doubt of the guilt of the defendants when seven of their fellows of equal intelligence and honesty have found that there is; if seven are for conviction, the five should equally seriously inquire whether there is a reasonable doubt of the guilt of the defendants when seven of their fellows of equal intelligence and honesty find there is no doubt. After three days spent in the trial of this

case, with no reason to believe that it can be any better tried before another jury, the court is disposed to direct you to further consider the case, believing that you can honestly come to an agreement.' ”

As said by this court in the following paragraphs:

“ . . . it is difficult to conceive what basis there was at that juncture for believing that the jury could honestly agree. . . . It was not correct to say that the government had a *right* to a *verdict* without further expenditure of time and money; *it had only a right to fair consideration of the case*. No obligation rested upon it to make any further expenditure, for, in case of a mistrial, it would have been the right, if not the duty, of the prosecuting officers to dismiss the prosecution. In any event, it was not *its* right *to demand an agreement*; nor did the defendant have such right.” (Italics ours.)

We add, neither did the court. The instruction was reversible error.

The defense counsel objected upon the retirement of the jury and repeatedly requested dismissal on the grounds of coercion. The trial judge expressed disagreement with some of the remarks that have been made by appellate court judges by coercion of juries. He expressed himself as follows to the defendant's objections to sending the jury out again. He said:

“The Court: What has happened here, I think, is a perfect answer to people who think that trial judges by asking a jury to try again to get together coerce them into finding a man guilty whom they really think is innocent. I don't think there is anything to it. I think it is an insult to the jury to suggest it. I do not believe any juror who is conscientious enough

to hold out for his views, just because the judge asks them to try again to agree, is going out and say: Well, it is all right with me. I don't think he is guilty but I will go along with you. I do not think that ever happens, **with all due respect to some of the remarks that have been made by appellate court judges on the subject.**" [Rep. Tr. p. 5637, lines 9 to 20, incl.]

Bear in mind the case was submitted to the jury on August 25, 1948. Four days later on August 29th the foreman reported to the Court that the jury was unable to agree. [Rep. Tr. p. 5597.] But the Court directed them to deliberate further. On August 30th three of the jurors indicated that no verdict could be reached. [Rep. Tr. pp. 5622-4.] And the foreman requested that the jury be discharged. [Rep. Tr. p. 5626, lines 21 and 22.] But again the Court refused to discharge the jury and proceeded to give a supplemental instruction regarding the desirability of reaching a verdict. [Rep. Tr. p. 5627 *et seq.*] This instruction was error under the circumstances and coerced the jury into reaching a verdict even though the Court attempted to caution the jurors not to surrender his conscientious convictions.

As the Court of Appeals for the Eighth Circuit said in *Edwards v. United States*, 7 F. 2d 598:

"In this case the jury, after 24 hours' deliberation upon a narrow issue, had disagreed. The foreman, when questioned expressed no hope of the probability of an agreement, and yet a speedy agreement was arrived at, acquitting the defendant on certain counts and convicting him on another, where there appeared to be little if any difference in the degree of proof adduced. We think the trial court erred in giving the supplemental instruction in the language disclosed

by the record, and that such error tended to deprive the defendant of a fair trial. The case should be and is reversed and remanded for a new trial. Reversed.”

And the said Court of Appeals in *Nick v. United States*, 122 F. 2d 660, said:

“If such statement is made in the face of an existing disagreement in the jury it is quite evident that its entire force would be felt as applying to an existing situation which had developed. *Language which might be innocent if uttered before submission of the case to the jury might be regarded as harmful if applied to a specific existing disagreement.*”

In the case at bar the supplemental instruction was given after four jurors had indicated no agreement could be reached and after the foreman had requested that the jury be discharged.

As the Supreme Court of the United States said in *Burton v. United States*, 196 U. S. 283, 25 Sup. Ct. 250, 49 L. Ed. 482, where the jury had been out but 36 hours:

“Balanced as the case was in the minds of some of the jurors, doubt existing as to the defendant’s guilt in the mind of at least one, it was a case where the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved. * * * A slight thing may have turned the balance against the accused under the circumstances shown by the record, * * *.”

As was said in *Stewart v. United States*, 300 Fed. 769:

“The jury in this case had deliberated many hours and had disagreed. There was at least one juror, perhaps more, that was convinced that the defendant was not guilty. The crucial questions in this case were questions of fact, that it was peculiarly the duty of the jury to consider and decide, among other things, the intention, the knowledge, the belief, the purpose, and good faith of the defendant Stewart. Much of the evidence on these questions was circumstantial; the testimony upon them was conflicting. The jury had disagreed. They received the supplemental charge from the court, retired, and in a short time returned with a verdict of guilty. As was said by the Supreme Court in Burton’s case, ‘a slight thing may have turned the balance against the accused under the circumstances shown by the record’ (196 U. S. 307, 25 Sup. Ct. 250), the supplemental charge and especially the excerpt from the opinion in Allen’s case were more than a slight thing, and our conclusion is that they bore too hard upon the convictions of the minority of the jury, and that an impartial and fair administration of justice will be served by a new trial of this case.”

In the case at bar the questions to be answered were just as crucial question of fact with circumstantial evidence and conflicting testimony. The supplemental instruction of the Court was more than a slight thing, especially the part regarding the desirability of the minority listening to the majority to consider if they were mistaken. See *Peterson v United States*, 213 Fed. 920 (C. C. A. 9).

As was said in *Bollenbach v. United States*, 326 U. S. 607:

“* * * But precisely because it was a ‘last minute instruction’ the duty of special care was indicated in replying to a written request for further light on a vital issue by a jury whose foreman reported that they were ‘hopelessly deadlocked’ after they had been out seven hours. ‘In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law,’ *Quercia v. United States*, 289 U. S. 466, 469. ‘The influence of the trial judge on the jury is necessarily and properly of great weight,’ *Starr v. United States*, 153 U. S. 614, 626, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge’s last word is apt to be the decisive word. * * *”

See also:

Nigro v. United States, 4 F. 2d 781 (C. C. A. 8);
Gideon v. United States, 52 F. 2d 427, (C. C. A. 8);
United States v. Samuel Dunkel & Co., 173 F. 2d 506 (C. A. 2).

After reviewing *Allen* and other cases, says:

“Hence each charge must be examined to determine whether or not its effect is to coerce or influence unduly, and a mere formal saving clause alluding to the jury’s rights will not suffice to overcome a total effect of coercion. * * *”

C. Separation of the Jury While Deliberating.

After the case was submitted to the jury there was an unlawful separation of the jurors. After the jury was taken out to deliberate during the hot month of August, 1947, and after they had deliberated for quite a while, they were taken to the Angeles Hotel at Fourth and Spring Streets. There were three bailiffs at the hotel. [Rep. Tr. p. 5736.] The jurors occupied three floors, they visited in different rooms unattended. [Rep. Tr. pp. 5736, 5737.] The testimony of the jurors on the motion for new trial shows that there was but three bailiffs and the jurors were permitted to come and go as they pleased so that they were not at all times under the supervision of a bailiff. Juror Clancy at reporter's transcript, page 5735 *et seq.* showed that he was permitted to go to the barber shop accompanied by one of the bailiffs. Some of the jurors remained in the lobby of the hotel. Others went to their rooms. The rooms were on at least two floors, perhaps three. Hence it was a physical impossibility for the jurors to have been accompanied by a bailiff. In addition the bailiffs and doctors were permitted to talk to the jurors, without the knowledge or consent of the defendant.

As was said in *Baker v. Hudspeth*, 129 F. 2d 779 (C. C. A. 10), at page 782:

"The purpose of keeping the jury in one body during the trial of the case and not permitting them to separate except under the supervision of the bailiff or officers of the court, is to make sure that nothing they read, see, or hear shall influence them in the con-

sideration of the case committed to them. 23 C. J. S., Criminal Law, §1348, page 1010. If it is made to appear that a jury sworn to try a case is subjected or exposed to any matter or thing which might *tend* to prejudice or influence their consideration of the case, or if the behavior of any member thereof is unbecoming to a gentleman of the jury, a presumption arises against impartiality and that presumption can only be rebutted by a clear and positive showing that such matter, thing, or behavior did not influence their verdict. * * *” (Citing cases.)

In view of the testimony of Juror Clancy the Court should have permitted the defendant to fully examine all of the jurors as to their conduct during the deliberations. Not to impeach the verdict as such but to ascertain the extent of extraneous interference upon the jury's deliberations.

See:

Mattox v. United States, 146 U. S. 140;

Hyde v. United States, 225 U. S. 347;

Chambers v. United States, 237 Fed. 513;

Wheaton v. United States, 133 F. 2d 522;

United States v. Sorcey, 151 F. 2d 899.

The separation of the jury and communications with the bailiffs and others raised a presumption of partiality and prejudice to the defendant. True, it is a rebuttable presumption, but in the case at bar it was not rebutted.

VII.

During the Deliberations of the Jury Not Only Were They Permitted to Separate Without Leave of Court and Without the Knowledge of Defendant or His Defense Counsel, but Also Some of the Jurors Became Ill and a Doctor Was Called to Treat This Juror Without Any Knowledge of the Defendant or His Counsel at the Time, and Who Were Not Informed, as a Matter of Fact, Until After the Trial Had Concluded.

On Sunday, August 29, 1948, a Doctor Was Called in to Treat the Foreman of the Jury, William W. Andrews. Such Doctor Was Present With the Juror, Who Was Seriously Ill, and Medicines Were Brought to the Juror, All Without the Knowledge of Defendant or His Counsel.

The Jurors Were Kept in a Room, Ill-Ventilated and Without Air Conditioning, During the Intense Hot Weather and Were Compelled to Deliberate Until Exhausted. By Reason of the Condition of the Heat, the Jury Rooms Were Open From Time to Time.

Other Jurors Became Ill and Had to Have Medical Treatment and Care During the Deliberation All Without Knowledge of the Defendant or His Counsel.

That Such Procedure and Proceedings Denied the Defendant a Fair Trial Guaranteed by the Due Process Clause of the Fifth Amendment to the Constitution of the United States and Was Coercive.

Furthermore, it was error for the trial court to have permitted any outsider in the jury room, or in communi-

cation in any manner, shape or form, with any juror or jurors without the complete knowledge of defendant and his counsel. Such is the oath given to the bailiffs or marshals upon their receiving the jury.

It would be an easy matter to communicate some message or messages through a doctor to a jury or jurors and such facts should have been fully and fairly disclosed to the defendant and his counsel. If there was genuine illness, then it could well have been a matter for the consideration of motions to discharge the jury because of that illness. It would certainly be coercive on the other jurors to force a jury to continue when one or more of their members was so ill he could not deliberate and it would deprive the jury of a full amount of 12 jurors.

The courts have held many times that the presence of an outsider in the jury room, or in contact with the jury, after a case has been submitted to the jury, is sufficient grounds for an order setting aside the verdict. (*People v. Bruneman*, 4 Cal. App. 2d 75-80.)

Even the judge in charge of the jury may not go to the jury room or talk to a single juror. His official place is on the bench and even as to him the law has closed the portals of the jury room and he may not enter.

Rickard v. State, 74 Ind. 275;

State v. Wroth, 15 Wash. 621 (47 Pac. 106);

Gibbons v. Van Alstyne, 56 Hun. 639 (9 N. Y. Supp. 157).

Therefore, not even a doctor should be permitted to enter, except under a situation in which both sides are informed and fully consent; and if the situation is of such emergency, at least the parties should be notified and all the

facts disclosed as soon as possible and their consent secured.

The jury had to be a full jury, composed of 12 persons, in full possession of their mental and physical capacities; otherwise it was not a jury as it exists at common law, consisting of twelve persons.

People v. Kelly, 203 Cal. 128, 133 (263 Pac. 226);

People v. Powell, 87 Cal. 348, 355 (25 Pac. 481, 11 L. R. A. 75);

Jennings v. State, 134 Wis. 307 (14 L. R. A. (N. S.) 862);

Dennis v. State, 25 L. R. A. (N. S.) 36.

In *Ray v. United States*, (8th Cir.), 114 F. 2d 508: Communications between any outsider and the jury after it has retired to deliberate should only take place after counsel for the respective parties have been informed and with the full knowledge of the defendant, if he is present. (*Fillippon v. Albion Vein Slate Company*, 250 U. S. 76, 63 L. Ed. 853; *Ah Fook Chang v. United States*, (9 Cir.), 91 F. 2d 643; *Fina v. United States* (10 Cir.), 46 F. 2d 643.) Private communications, even though harmless in themselves, may open the way to abuses and destroy confidence in legal procedure and the judiciary.

In this case, when the jury returned into the court, it was of vital importance to know the medical treatment that was afforded the jurors in view of the consequence of the proceedings.

“Courts are extremely jealous about anything occurring with the jury, which does not become of record in the court room.”

Mattox v. United States, 146 U. S. 140, 36 L. Ed. 917.

Had we known what the doctor, or doctors, had said and done prior to the jury's return into court asking for its discharge, we could have well presented an argument to the trial judge which would have required either his immediate discharge of the jury or his postponement thereof until it was determined that at least one or more of the jurors was physically able to continue. Certainly this was a right which the defendant had and was taken away from him.

During jury deliberations two or more jurors became ill. These facts were concealed from the defendant and his counsel and only after the jury was finally discharged did they learn of it.

Juror Andrews' physical condition was described by Dr. Leo Praeger, a house physician of the Angelus Hotel [R. 5707, *et seq.*]. Dr. Praeger said he was called on August 29th and he went to the room at about 10:00 or 10:30 in the morning, having been called around 9:00 o'clock. He went to Juror Andrew's room and found him extremely nervous. He made a diagnosis of nervous exhaustion [R. 5709]. The juror told him he had not been able to sleep for the last 48 hours; he had been under a nervous strain. He told the doctor and the bailiff that if he was taken out he wanted to sit in the back of the car. He did not want to sit with the other jurors [R. 5710]. He said he didn't know what might happen to him, or what he might do to somebody if he didn't sit in the back of the car [R. 5711]. He said he wanted to sit where "I won't have to fight with somebody." [R. 5711.] He examined the man's heart and blood pressure and on the basis of that diagnosed the matter as nervous exhaustion.

He left some medicine for the juror and told the bailiff to keep the man as quiet as possible, and see that he had no more excitement [R. 5713].

No information was given to counsel for the defendant or the defendant regarding the doctor's visit or attention to the juror.

In talking to Juror Clancy, Juror Andrews said "something about the talk in the jury room, the hearing room, was going round all the time and he was getting filled up on it, and could not permit it, or something like that." He was getting tired of the whole thing and it was going around in his mind all the time, and he could not sleep [R. 5728]. It was very hot in the jury room [R. 5730].

Juror Otilia Younger was examined and treated in a bus by Drs. Shaw and Sommers [R. 5718]. She was suffering from itching in the external canal and a case of sharp shooting pains in the ear proper [R. 5718]. Again the court failed to notify counsel or the defendant of the presence of outside persons in connection with the jury.

During the deliberation one of the jurors went into the ladies apartment and commenced to cry, and the other lady jurors went in and one of them gave her some smelling salts or something [R. 5739]. After the jury was discharged, Juror Nagumo had a nervous collapse.

(a) It is peculiar that the factual situation in most of the cases on this subject have been instances when the court *has* discharged the jury or a juror; nevertheless, the principles governing those cases should, logically, apply even though the factual situation is reversed—*where the court has FAILED to discharge the jury or a juror*.

It is obvious that a juror who is too sick to intelligently deliberate can, by remaining on the jury thwart the ad-

ministration of justice with as much efficacy as can the *discharge* of a juror who is well enough to intelligently deliberate. THUS THE legal QUESTION IS ALWAYS THE SAME: **Has there been an abuse of discretion** (regardless of whether the outcome of such abuse is a discharge of the juror or a failure to discharge the juror)?

In all cases in which the health of a juror comes to the attention of the court, an orthodox judicial procedure should be followed in exercising the discretion of the court. Otherwise there can be no possibility of a review in such matters.

Speaking on the subject of exercise of such discretion the court in *Stough v. State*, 128 P. 2d 1028, said:

“It is idle to argue that the discharge of the jury would not materially affect the rights of the defendant. *Has he no right to be heard?* Who can say that he might not have urged some reason which would have influenced the Court in the *exercise* of its *discretion?*”

Discretion to do *what?* To discharge or not to discharge, AND the defendant should have as much right to argue *for* discharge as against it.

See also:

Upchurch v. State, 38 S. W. 206;

State v. Chandler, 274 Pac. 303.

This deprived the defendant of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States, and of jury trial guaranteed by the Sixth and Seventh Amendments.

Snyder v. Massachussetts, 290 U. S. 606;

Hopt v. Utah, 110 U. S. 574.

If the right to discharge a juror for illness requires the judge to conduct a proceeding in open court in the presence of the defendant and his counsel then the right to retain an ill juror suffering from nervous exhaustion requires that the defendant and his counsel be promptly informed about the juror's illness and treatment so that he may duly inquire and make appropriate motions or objections to the retention of a juror who is incapacitated and unable to deliberate.

On August 30th, Jury Foreman Andrews, who had been diagnosed as suffering from "nervous exhaustion" twice asked the court to discharge the jury. His request was actually an earnest plea, which the judge ignored—this in the face of knowledge of the juror's illness. Nothing was stated at that time by the judge about the juror having been so ill as to require medical attention. If he would have offered counsel an opportunity to inquire whether juror could go ahead. Usually, even in an emergency, the courts call counsel and apprise them of the situation and receive their consent or disapproval.

The failure to do so deprived the defendant of rights guaranteed by the Fifth and Sixth Amendments of the United States Constitution.

Snyder v. Massachusetts, supra;

Hopt v. Utah, 110 U. S. 574, 578, 579.

The fundamental right of an accused to be present at every stage, especially in Capitol cases, has been stressed by judicial expression.

Snyder v. Massachusetts, 290 U. S. 606, 90 A. L. R. 575;

Hopt v. Utah, 110 U. S. 574;

Schaub v. Berggren, 143 U. S. 444, 448.

The rule may be stated under the Fifth Amendment, the same as the Fourteenth Amendment, that an accused has the privilege to be present whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge (*Snyder v. Massachussetts, supra*).

The right to know about the condition of jurors who may be too ill to deliberate intelligently or satisfactorily is such a substantial right.

Lewis v. U. S., 146 U. S. 370, 36 L. Ed. 1011;

Dowdell v. U. S., 221 U. S. 325, 330.

On motion for a new trial which was denied it developed that while deliberating, William W. Andrews, the foreman of the jury, became ill. Mr. Andrews told one of the jurors he could not reach the light. That it was going round in his head [Rep. Tr. p. 5727] all the time, and he was getting filled up on it and could not permit it or something. He said he was getting tired of the whole thing and it was going around in his mind all the time and he could not sleep. [Rep. Tr. p. 5728.] He sat in the back of the bus; he had been attended by a doctor, Dr. Leo Prager, who diagnosed his case as that of "nervous exhaustion." [Rep. Tr. p. 5709.] He said he had not been able to sleep for the last 48 hours. [Rep. Tr. p. 5709.] He said there was a lot of animosity between him and another juror and he asked that he be placed in the back of the bus so he "won't have to fight with somebody." [Rep. Tr. p. 5711.] The doctor gave him a sedative.

No report was made of this occurrence to the defendant or his counsel, the matter was kept completely confidential between the bailiff and the trial judge. Dr. James R.

Shaw, Dr. Ignacius Sommers attended another juror, Otilia Younger for an ear trouble, with sharp shooting pains. [Rep. Tr. p. 5718.] No report was made of this occurrence either to the defendant or his counsel.

Another juror became ill in the jury room, commenced to cry and other jurors went in and gave her smelling salts. [Rep. Tr. p. 5739.]

The trial judge on motion for new trial, conceded that:

“from the six people from the Marshal’s Office who were in attendance upon this trial, not one of them had ever had any experience with the jury. I asked Judge Harrison if he would lend me the services of his crier. He was the only judge that was here at that time and his crier was the only crier in attendance at the time, and he sent Mr. Sheibe down here to help me out.” [Rep. Tr. p. 5748.]

The judge said before he was awake on Sunday morning the telephone started ringing and he answered it and it was Mr. Sheibe. He told the judge Mr. Andrews was ill, what should he do. The judge said:

“I told him to get the house physician if he could immediately. . . . He reported to me later that some doctor had attended Mr. Andrews and found him nervous and gave him some pills—Phenol-Barbital to take.” [Rep. Tr. p. 5769.]

“I did not think to bother counsel with such a thing as that. It was another the bailiff reported to me about this later juror had some trouble with her ear.”

He instructed the doctor to take care of her.

"*I did not report that to you gentlemen. There were a great many things.*" [Rep. Tr. p. 5770.]

Defense counsel complained on motion for new trial because the judge had not informed him at the time so that the exact condition of Mr. Andrews could then have been determined, and that such procedure denied substantial rights to the defense. [Rep. Tr. p. 5771.] The court said:

"We saw them Monday morning. You saw that argument, in effect almost a quarrel between Mrs. Ziegler and Mr. Andrews." [Rep. Tr. p. 5772.]

The judge inferred that foreman Andrews was upset because of personal differences between him and Mrs. Ziegler. [Rep. Tr. p. 5772.] This did not explain why Mr. Andrews could not see the electric light in his room, *was suffering from nervous exhaustion for 48 hours, and was ready to beat up on somebody.*

When juror Clancy on motion for new trial was pressed to information he had given attorney Morris Lavine after the trial, he became suddenly ill and fainted on the witness stand and had to be carried off and to have the services of two doctors who were in the courtroom, and he was never able to be recalled. [Rep. Tr. p. 5772.]

Another juror, Mrs. Florence Babb, also became ill in the jury room and threw up. [Rep. Tr. p. 5774.] And, while, the jurors were deliberating, and unable to agree on the sixth day of deliberation, after they had reported they were hopelessly deadlocked, a Marine Band suddenly started played *patriotic airs in front of the Federal Building.* [Rep. Tr. p. 5776.] On complaint of the defense counsel, the jurors were taken out another way.

We respectfully submit that the sordid picture of the form and manner and length of the jury's deliberations, the high tension, passion and heat, developed in the jury room, in addition to the weather conditions and all of the surrounding circumstances and the instructions of the court that it was their duty to agree, and to return a verdict after they had twice requested to be discharged, denied to this appellant a fair trial guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States.

The defendant was denied a fair trial guaranteed by the Fifth Amendment to the Constitution in that, during the deliberation of the jury, one or more jurors became ill and a doctor or doctors were called without any notification at any time during the trial to the defendant or his counsel, and without any opportunity to learn the nature of the illness and whether by reason of such illness such juror or jurors became incompetent to deliberate properly.

The trial judge was particularly careful throughout the trial to require that the defendant be present at every state of the proceeding, even at the bench when the jury had been excused; yet, when the jury went out to deliberate and before they returned into court stating it was impossible to continue further, a physician was called to attend a juror or jurors who had become ill during the deliberation, and such attendance was made without any such fact ever being communicated during the trial to either the defendant or his counsel. Had the defendant or his counsel been apprised on Monday morning when the jury returned and stated it was impossible to continue, that on Sunday the foreman of the jury and other jurors had been attended medically by a physician because of the nature of the deliberations, defense counsel would have

been in a position to present forceful and cogent evidence to discharge the jury at that time, and also would have been in a position to determine if alternate jurors were required as the result of the illness of one or more of the jurors. Such information, however, was withheld from the defendant and his counsel.

VIII.

A. The Court Erred in Declining to Poll the Jury as to the Names of the Two Witnesses Who Established the Constitutional Requirement.

When the jury returned into Court after it had sent a message that it had partially arrived at an agreement and had returned its partial verdict, counsel for appellant requested the Court to poll the jury as to the names of the two witnesses whom the jury relied on to establish the overt act. The Court denied the defendant's request. Thereafter it was stipulated that the same request had been made and denied as to each alleged overt act in which agreement was claimed to have been arrived at.

The Court denied the request as to each alleged overt act. It was stipulated that the request might be deemed to have been made as to polling the jury as to every such act.

One of the purposes of polling the jury where special verdicts have been returned in addition to a general verdict is to determine if the general verdict has actually been based upon the facts as found by the jury. If the special verdict is contrary to the general verdict, a new trial is required.

Inasmuch as there were several witnesses to each of the overt acts it may be that some of the jurors believed that

two certain witnesses proved the particular overt act while some of the jurors believed that two different witnesses proved the overt act. With this uncertainty in the record it is impossible to ascertain if the defendant has been convicted by the two witness requirements of the Constitution.

This was highly prejudicial error.

Where the only crime mentioned in the Constitution is specifically defined and the quantum of evidence that is required is therein specified (Art. III, Sec. 3, U. S. Constitution), and the court has requested special verdicts which do not sufficiently establish the constitutional requirement, a request to poll the jury—specifically to determine if there has been unanimity or sufficient proof is necessary. Where, as here, there have been several witnesses to the alleged overt act or parts of the alleged overt act, one juror might have believed one witness but disbelieved another, and another juror vice versa. What the Constitution requires is unanimity by the jury as to the same witnesses to the alleged overt act and that these same witnesses be at least two in number to the whole of the overt act, or the same two in number to such parts of the alleged overt act as would form a chain in the whole of the overt act.

Cramer v. United States, 325 U. S. 1, 89 L. Ed. 144;

Haupt v. United States, 330 U. S. 631, 91 L. Ed. 1145.

It was the right of the defendant to have the court poll the jury to determine if this quantum of evidence had actually been relied on by the jury so as to determine if the general verdict was actually based upon the special findings of the jury as to unanimity.

(B) The Return of the Jury Without a Unanimous Verdict on the Whole of the Indictment as Alleged Was Necessary Unless the Government Withdrew the Overt Acts Before Submission to the Jury.

The indictment in this case alleged a continuation of the treason from October, 1944 until August, 1945.

The prosecution withdrew one overt act and the court dismissed another overt act, but there was no withdrawal of the other overt act. Therefore, it was necessary for the prosecution to prove the essential elements of the indictment as laid and its continuous character so alleged in the indictment as to each and all of the acts. It was, therefore, mandatory for the jury to return a verdict as to the whole of the indictment which had not been withdrawn, or the result was necessarily a disagreement by the jury. Proof of parts of the overt acts did not prove the indictment as laid and as submitted to the jury.

When the jury reported finally after eight days of deliberation that they were ready to return into court and stated that they had arrived at an agreement as to some of the overt acts, the court requested the prosecution if it wished to withdraw some of the overt acts. The Government did not do so. Thereafter the jury was permitted to return the indictment as submitted to the jury without the withdrawal of any of the overt acts.

It is respectfully submitted that the jury was at that time a disagreed jury and not an unanimous jury to the indictment as specified.

(C) The Case Actually Resulted in a Mistrial.

Although the jury returned a general verdict in this case, there were several special verdicts submitted to them for their consideration. It was therefore the right of the defendant to have a unanimous decision by the jury on each of the special findings submitted to them. Failure to find on those special issues—one way or another—resulted actually in a hung jury.*

When the jury returned into court for further deliberation, the appellant demanded that the jury be returned for further deliberation and for final determination of the issues. The court asked the jurors if they wished to return and they stated they did not. There were five issues left without any agreement or without returning any verdicts thereon. We submit that this resulted in a hung jury and that the court, therefore, had no right to discharge the jury under such a situation.

In *Andres v. United States*, 333 U. S. 740, 92 L. Ed. 1055, 333 U. S., page 748, the court said:

“Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply.” (See *American Pub. Co. v. Fisher*, 166 U. S. 464, 41 L. Ed. 1079.)

*At the time the jury came in the defendant objected to the discharge of the jury without reaching a unanimous agreement to the remaining special verdicts as to alleged overt acts (e), (f), (h), (l) and (o). The court inquired of the jurors whether they believed they could reach a verdict by further deliberation as to said special verdicts and the jurors state “they do not,” no juror stating that he desired to deliberate further. [Clk. Tr. p. 3(a).]

It must be seen that the Court left the question of going back to deliberate further to the jury, and did not withdraw any of the overt acts named.

“In criminal cases this requirement of unanimity extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury. A verdict embodies in a single finding the conclusions by the jury upon all the questions submitted to it.”

In Justice Frankfurter’s concurring opinion in *Andres v. United States*, 333 U. S. 763, the court said:

“‘Until the twelve judges have agreed on every part of the verdict they have not agreed on any verdict.’ (*Id.* 287 N. Y. at 171, 38 N. E. 2d 482, 138 A. L. R. 1222.)”

It is respectfully submitted that when the jury so reported to the court, the court should have sent them back to determine every other issue of the case—either affirmatively or negatively—and that its failure to do so actually resulted in a hung jury in this case.

Andres v. United States, 333 U. S. 740.

The discharge of the jury over the objections of the defendant and without an agreement, therefore, constituted jeopardy which actually constituted an acquittal in this case.

IX.

When the Trial Court Therefore Discharged the Jury Without Consent of the Defendant and Over His Objections Before a Unanimous Verdict Had Been Reached on Each of the Issues Was in Fact an Acquittal.

Ex parte Lange, 18 Wall. 872;

People v. Webb, 38 Cal. 476;

People v. Hunckler, 48 Cal. 331.

X.

The Court Erred in Permitting the Prosecutor to Add Different and New Overt Acts During the Course of the Trial in His Bill of Particulars. The Object of the Bill of Particulars Was to Furnish the Information to the Defendant Before Trial—Not After Trial.

The Court permitted names to be added during the trial to each of the overt acts. This was over the objections of the defense [Clk. Tr. 89]. While these were names of persons heretofore supplied the defense, they were to different overt acts. It was in the middle of the trial. The defense had no opportunity at this stage to investigate the new information.

The object of a Bill of Particulars is to enable a defendant to be prepared for trial; not to supply him information after the trial.

Rule 7(f), *Rules of Criminal Procedure*.

Rule 7(f) of the Rules of Criminal Procedure reads as follows:

“(f) BILL OF PARTICULARS. The court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires.”

Glasser v. United States, 86 L. Ed. 680;

Barnard v. United States, 16 F. 2d 451, Cert. denied, 274 U. S. 736.

XI.

The Court in Considering Punishment Apparently Was Influenced by Matters of Which There Was Absolutely No Evidence and Which Were Argued Previously on the Motion for a New Trial.

The Court said:

“Like Hans Haupt, the defendant in Haupt v. United States, 330 U. S. 631 (1947), the defendant gave every aid and comfort to the enemy that he was able to give. And the evidence compels the conclusion that what the defendant was able to do, with his brutal, slave-driving tactics, added many tons of nickel ore to Japan’s war effort that would never otherwise have been mined or smelted by American prisoners of war.” [Rep. Tr. p. 5825, lines 6-13.]

This was certainly a fallacious conclusion. The only acts relating to the defendant adding any tons of nickel ore to Japan’s war effort were not involved in this case. Not a single overt act found by the jury established that Kawakita added a single ounce of nickel ore to Japan’s war effort. As we have heretofore pointed out, five of the alleged overt acts were in aid of the Military in punishing Americans for crimes committed against laws of Japan and against the military authorities in the prisoner of war camp and at a time when Americans were no longer working in the mine. Another was in compelling a man to work who was not working. The other was in carrying a second bucket of paint. The other act was in not rendering medical aid and the other act was also a punishment act.

If there was any evidence that Kawakita added one ounce of nickel ore to Japan’s war effort, we have failed to find it. That was the government’s theory at the outset

of the case in bringing the charges. But, when it appeared that the defendant had been drafted to work in the Camp, this fact disappeared from the case and Overt Acts (m) and (n), on which these charges were based, were withdrawn. Nevertheless, it seems still to inhere in the court's mind at the time of the consideration of the Motion for a New Trial and was referred to indirectly at the time of judgment and sentence. The judgment was indeed arbitrary and capricious and not founded on a single fact present in the case.

That the court, therefore, took into consideration in pronouncing the death sentence a fact not proved requires the arbitrary judgment to be set aside.

XII.

The Trial Judge Erred in Its Arbitrary Imposition of the Sentence of Death Upon the Appellant.

The judge's reason for imposing the death penalty is expressed by him [Rep. Tr. p. 5856], as follows:

"If this defendant were to go from this court a free man, he would be condemned to live out his life in bitter scorn of himself. . . . These thoughts, and others, many of which were mentioned by you, Mr. Lavine, must tell the defendant that his life if spared would not be worth living. Considering the inherent nature of treason and the purpose of the law in imposing punishment for the crime, the reflection leads to the conclusion *that the only worth while use for the life of a traitor such as this* defendant has proved himself to be is to serve as an example to those of weak moral fiber who may hereafter be tempted to commit treason against the United States." [Rep. Tr. p. 5857.] (Italics ours.)

The judge then imposed judgment.

In fixing the punishment for treason Congress apparently did not agree with the trial judge. Neither did the framers of Constitution. The latter did not put any punishment in the Constitutional definition of treason. Mr. Justice Jackson, in *Cramer v. United States*, 325 U. S. 1, 24, said:

“Distrust of treason prosecutions was not just a transient mood of the Revolutionists. In the century and a half of our national existence *not one execution on a Federal treason conviction* has taken place. Never before had this court had occasion to review a conviction.” (Italics ours.)

And, in a footnote of *Cramer v. United States*, 325 U. S. 1, 14, the court pointed out that every member of the Constitutional Convention “could have been prosecuted and might have been convicted as ‘traitors’ under the British Law of constructive treason. It was in this setting that Congress adopted the law of Treason and the punishment for it, fixing it at not less than five years and the maximum of death. The Congress of the United States in its legislative policy and our own history is contrary to the arbitrary finding of the judge that the law makers fixed the policy that

“the only worth while use for the life of a traitor is to serve as an example to those of weak moral fiber who may hereafter be tempted to commit treason against the United States.”

Such arbitrary action is a condemnation of the Legislative policy by the Congress of the United States and the historical policy of the United States in treason cases. It is arbitrary and capricious.

In the *Cramer* case, which was later set aside, the judge fixed the punishment at 45 years. In the *Haupt* case the

judge fixed the penalty at life. In the *Tokyo Rose* case the judge fixed the penalty of ten years. In the *Chandler* case the court fixed the penalty of life. And, in the "*Axis Sally*" case in Washington the court fixed the punishment for fifteen years.

As said by the Court in *Cramer v. United States*, quoting from Payne:

"He that would make his own liberty secure, must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach himself. We still put trust in it."

Conclusion.

TOMOYA KAWAKITA went to Japan as a boy, full of ambition to learn and improve himself. He was caught in the maelstrom of a great war. To paraphrase the language of *Chandler v. United States*, his acts were performed under war time stress and duress; he was drafted by the foreign government as one of its citizens, and he was under enemy compulsion. In order to earn a living, he accepted employment for which he was later drafted "in these days of total war."*

*In *Chandler v. United States*, 171 F. 2d at page 945, the court said:

"The present case involves no problem of acts of *aid and comfort performed under enemy duress*. Chandler was not under enemy compulsion; upon the contrary it was he who sought employment with the Short Wave Station. Nor does the present case necessitate any detailed examination as to how far an American citizen, *caught in an enemy country at the outbreak of war*, may, *in order to earn a living* and without the stigma of treason, accept employment which in these days of total war might conceivably be of some aid in the enemy war effort. Here, as elsewhere in the law, there may be troublesome questions of degree."

In this setting Kawakita was not guilty of any treason at all. As a Japanese citizen, he owed total loyalty to the Government of Japan, which was giving him its protection and of whose citizenship he was one.

The overt acts, in their setting, were trivial. We believe the accounts of the men were exaggerated, and contradictory and unsubstantial. Of a total period of one year covered by the indictment, the government was only able to find fifteen trivial acts of which they thought sufficient to base an indictment upon. Most of them were punishments imposed by the military authorities in its conduct of the camp under national law; two were withdrawn; five others were not found by the jury, and eight were found against the defendant by the jury. Of these eight, five allegedly consisted of assisting the local military authorities in administering punishments for serious offenses against the internal laws of Japan and the military laws of the prisoner of war camp. One was in not giving medical attention as quickly as prisoners of war thought desirable, and only two of those acts remaining were acts claimed to cause anyone to exert himself toward effort or greater efforts. The Toland incident was based on conflicting testimony, as it was shown by the testimony of Doctor Bleich that at that time and on that date Toland was doing "light duty" adjoining the camp in the garden, and was not doing any work removing rock at all. Others were also conflicting and uncertain as to times, places, and dates. The crowning piece of allegation

of treason was that Kawakita caused a man to carry two buckets of paint when the man was only carrying one bucket—at a time when he was supposed to be carrying two buckets of paint.

For these alleged trivial “overt” acts, in this untreasonous setting, the trial judge imposed the *death* penalty.

In the setting there was no treason.

We respectfully pray for reversal on each and all of the grounds set out in this brief, and for an order directing a discharge of the defendant.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Appellant Tomoya Kawakita.



APPENDIX.

A.

Article III, Section 3, Constitution of the United States of America.

“Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”

B.

Title 18, Section 1 United States Code (1946 Edition).

“Section 1. (Criminal Code, section 1.) Treason. Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason. (Mar. 4, 1909, ch. 321, Sec. 1, 35 Stat. 1088.)”

C.

Title 28, Section 102, United States Code (1946 Edition).

“Section 102. (Judicial Code, Section 41.) Offenses on the high seas.

The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought. (Mar. 3, 1911, ch. 231, Sec. 41, 36 Stat. 1100.)”

D.

Article VI of the Constitution of the United States
Paragraph Two, Provides:

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”
[See Defendant’s Exhibits CT and CW and exchange of letters and telegrams between the United States and Japan relating to Treaties regarding the Prisoners of War Camps.]

Exhibit CW is a letter from the Department of State as follows (the copies of agreements and proclamations referred to are in the original Exhibits with the Court and are not recopied here):

“My Dear Mr. Lavine:

“Reference is made to your letter of June 21, 1948, and our telephone conversation of July 2, 1948, regarding the meaning of the words “mutatis mutandis” and of the statement that “. . . Although not bound by the Convention relative treatment prisoners of war Japan will apply mutatis mutandis provisions of that Convention to American prisoners of war in its power.” Reference also is made to your letter of June 24, 1948 requesting certified copies of agreements concerning the trial of Japanese or others for war crimes.

“In accordance with our conversation, I enclose herewith certified copies of telegrams sent and received by the Department concerning the arrangements made between the United States Government and the Japanese Government with regard to the treatment of prisoners of war and civilian internees and the application of the convention relating to the treatment of prisoners of war, signed at

Geneva on July 27, 1929. Your attention is invited particularly to telegram no. 376, February 7, 1942 to the American Legation at Bern, and to telegram no. 733, February 24, 1942 from the American Legation at Bern, the second paragraph of which refers to the Japanese Government's declaration that it will apply, on condition of reciprocity, the Geneva Prisoners of War Convention in the treatment of prisoners of war and, in so far as the provisions of the Convention shall be applicable, in the treatment of civilian internees, and that the latter shall not be forced to perform to perform labor against their will. On the basis of these arrangements, made with the Japanese Government through the Swiss Government, concerning the treatment of prisoners of war and civilian internees, this Government considers that there was a binding commitment on the part of Japan to apply the provisions of the Geneva Convention to American prisoners of war.

In accordance with the request in your letter of June 24, 1948 there are enclosed also certified copies of the international agreements and proclamations relating to the trial of war criminals.

Sincerely yours,

For the Secretary of State:

BRYTON BARRON

BRYTON BARRON

Assistant for Treaty Affairs

Office of the Legal Adviser

Enclosures:

1. Certified copies
of telegrams.
2. Certified copies of
agreements and proclamations.

E.

Treaty Series No. 539—Convention Between The
United States and Other Powers, Provides as
Follows:

“Article 4. Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them.” [Exhibit CR.]

* * * * *

“Article 6. The State may utilize the labour of prisoners of war according to their rank and aptitude, officers excepted. The tasks shall not be excessive and shall have no connection with the operations of the war.

Prisoners may be authorized to work for the public service, for private persons, or on their own account.

Work done for the State is paid at the rates in force for work of a similar kind done by soldiers of the national army, or, if there are none in force, at a rate according to the work executed.

When the work is for other branches of the public service or for private persons the conditions are settled in agreement with the military authorities.

The wages of the prisoners shall go towards improving their position and the balance shall be paid them on their release, after deducting the cost of their maintenance.” [Exhibit CR.]

“Article 7. The Government into whose hands prisoners of war have fallen is charged with their maintenance.

In the absence of a special agreement between the belligerents prisoners of war shall be treated as regards board, lodging, and clothing on the same footing as the troops of the Government who captured them.” [Exhibit CR.]

“Article 8. Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State in whose power they are. Any act of insubordination justifies the adoption towards them of such measures of severity as may be considered necessary.

Escaped prisoners who are retaken before being able to rejoin their own army or before leaving the territory occupied by the army which captured them are liable to disciplinary punishment.

Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment on account of the previous flight.” [Exhibit CR.]

Treaty Series, No. 846, Regarding the Conduct of Prisoners of War—Convention between the United States of America and other Powers.

Chapter 3. *Penalties Applicable to Prisoners of War*, Article 45, provides as follows:

“Prisoners of war shall be subject to the laws, regulations, and orders in force in the armies of the detaining power.

An act of insubordination shall justify the adoption towards them of the measures provided by such laws, regulations and orders.”

Trial by Consuls in Japan.

Title 22, U. S. Codes Annotated provides:

“Section 141. Judicial authority generally. To carry into full effect the provisions of the treaties of the United States with certain foreign countries, the ministers and consuls of the United States in China, Siam, Turkey, Morocco, Muscat, Abyssinia, Persia, and the territories formerly a part of the former Ottoman Empire including Egypt, duly appointed to reside therein, shall, in addition to other powers and duties imposed upon them, respectively, by the provisions of such treaties, respectively, be invested with judicial authority described in this chapter, which shall appertain to the office of minister and consul, and be a part of the duties belonging thereto, wherein, and so far as, the same is allowed by treaty, and in accordance with the usages of the countries in their intercourse with the Franks or other foreign Christian nations. (R. S. §§4083, 4125, 4126; June 14, 1878, c. 193, 20 Stat. 131.)” (Note: Japan was added by treaties in 1857-1858.)

“Section 142. General jurisdiction in criminal cases. The officers mentioned in the preceding section are fully empowered to arraign and try, in the manner provided in this chapter, all citizens of the United States charged with offenses against law, committed in such countries, respectively, and to sentence such offenders in the manner in this chapter authorized; and each of them is authorized to issue all such processes as are suitable and necessary to carry this authority into execution. (R. S. §4084.)”

“Section 145. System of laws to be applied. Jurisdiction in both criminal and civil matters shall, in all cases,

be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute such treaties, respectively, and so far as they are suitable to carry the same into effect, extended over all citizens of the United States in those countries, and over all others to the extent that the terms of the treaties, respectively, justify or require. But in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others in those countries; and if neither the common law, nor the law of equity or admiralty, nor the statutes of the United States, furnish appropriate and sufficient remedies, the ministers in those countries, respectively, shall, by decrees and regulations which shall have the force of law, supply such defects and deficiencies. (R. S. §4086.)”

(United States Code Annotated, Title 22, Chapter 2, pages 70, 71, 72 and 74.)

Treaties.

Treaties between Japan and the United States.

The treaty of June 17, 1857, executed by the consul-general of the United States and the governors of Simoda, is the one which first conceded to the American consul in Japan authority to try Americans committing offenses in that country. Article IV of that Treaty is as follows:

“Art. IV. Americans committing offenses in Japan shall be tried by the American consul-general or consul, and shall be punished according to American laws. Japanese committing offenses against Americans shall be tried

by the Japanese authorities, and punished according to Japanese laws." (11 Stat. 723.)

The Treaty with Japan of July 29, 1858, in some particulars changes the phraseology of the concession of judicial authority to the American consul in Japan, but, as we shall see subsequently, without revocation of the concession itself. Its sixth article is as follows:

"Art. VI. Americans committing offenses against Japanese shall be tried in America consular courts, and when guilty shall be punished according to American law. Japanese committing offenses against Americans shall be tried by the Japanese authorities and punished according to Japanese law. The consular courts shall be open to Japanese creditors, to enable them to recover their just claims against American citizens and the Japanese courts shall in like manner be open to American citizens for the recovery of their just claims against Japanese." (12 Stat. 1056.)

As will be seen, the language of the fourth article of the Treaty of 1857 is that "Americans committing offenses in Japan shall be tried," etc.; while the language of the sixth article of the Treaty of 1858 is that "Americans committing offenses against Japanese shall be tried," etc. Offenses committed in Japan and offenses committed against Japanese are not necessarily identical in meaning. The latter standing by itself would require a more restricted construction. But the twelfth article of that Treaty obviates that. It is as follows:

"Art. XII. Such of the provisions of the Treaty made by Commodore Perry, and signed at Kanagawa on the 1st of March, 1854, as conflict with the provisions of this Treaty are hereby revoked; and as all the provisions of

a Convention executed by the consul-general of the United States and the governors of Simoda, on the 17th day of June, 1857, are incorporated in this Treaty, that Convention is also revoked."

It will thus be perceived that the revocation of the Treaty of 1857 was upon the assumption and declaration that all its provisions were incorporated into the Treaty of 1858.

The war between the United States and Japan did not abrogate the treaty between those two countries.

Clark, Attorney General v. Allen, 331 U. S. 503;

Society for the Propagation of the Gospel v. New Haven, 8 Wheat, 464, 494.

The fact that Japan was under a military government from August 15, 1945, would not have precluded it from performing its obligations under a previous treaty.

Neely v. Henkel, 180 U. S. 109, 120.

It is clear that treaties may "confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limitations of the other" which will be enforced by the Courts.

Edye v. Robertson, 112 U. S. 580;

United States v. Rauscher, 119 U. S. 407;

Johnson v. Browne, 205 U. S. 309;

Cook v. United States, 288 U. S. 102, 121;

Ford v. United States, 273 U. S. 593;

United States v. Schonweiler, 19 F. 2d 387;

United States v. Ferris, 19 F. 2d 925.

F.

U. S. C. A. Title 8, Sec. 800. Right of Expatriation.

“Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic. R. S. Sec. 1999.

G.

U. S. C. A. Title 8, Sec. 801. General Means of Losing United States Nationality.

“A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

(a) Obtaining naturalization in a foreign state, either upon his own application or through the naturalization of a parent having legal custody of such person: *Provided, however,* That nationality shall not be lost as the result of the naturalization of a parent unless and until the child shall have attained the age of twenty-three years without acquiring permanent residence in the United States: *Pro-*

vided further, That a person who has acquired foreign nationality through the naturalization of his parent or parents, and who at the same time is a citizen of the United States, shall, if abroad and he has not heretofore expatriated himself as an American citizen by his own voluntary act, be permitted within two years from the effective date of his¹ chapter to return to the United States and take up permanent residence therein, and it shall be thereafter deemed that he has elected to be an American citizen. Failure on the part of such person to so return and take up permanent residence in the United States during such period shall be deemed to be a determination on the part of such person to discontinue his status as an American citizen, and such person shall be forever estopped by such failure from thereafter claiming such American citizenship; or

(b) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state; or

(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; or

(d) Accepting, or performing the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible; or

(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or

¹So in original. Probably should read "this."

(f) Making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(g) Deserting the military or naval service of the United States in time of war, provided he is convicted thereof by a court martial; or

(h) Committing any act of treason against, or attempting by force to overthrow or bearing arms against the United States, provided he is convicted thereof by a court martial or by a court of competent jurisdiction. Oct. 14, 1940, c. 876, Title I, Subchap. IV, Sec. 401, 54 Stat. 1168.”

H.

U. S. C. A. Title 8, Sec. 802. Presumption of Expatriation.

“A national of the United States who was born in the United States or who was born in any place outside of the jurisdiction of the United States of a parent who was born in the United States, shall be presumed to have expatriated himself under subsection (c) or (d) of section 801, when he shall remain for six months or longer within any foreign state of which he or either of his parents shall have been a national according to the laws of such foreign state, or within any place under control of such foreign state, and such presumption shall exist until overcome whether or not the individual has returned to the United States. Such presumption may be overcome on the

presentation of satisfactory evidence to a diplomatic or consular officer of the United States, or to an immigration officer of the United States, under such rules and regulations as the Department of State and the Department of Justice jointly prescribe. However, no such presumption shall arise with respect to any officer or employee of the United States while serving abroad as such officer or employee, nor to any accompanying member of his family. Oct. 14, 1940, c. 876, Title I, Subchap. IV, Sec. 402, 54 Stat. 1169.” (Emphasis ours.)

I.

U. S. C. A. Title 8, Sec. 803. Restrictions on Expatriation; Residence in United States; Age.

“(a) Except as provided in subsections (g) and (h) of section 801, no national can expatriate himself, or be expatriated, under this section while within the United States or any of its outlying possessions, but expatriation shall result from the performance within the United States or any of its outlying possessions of any of the acts or the fulfillment of any of the conditions specified in this section if and when the national thereafter takes up a residence abroad.

(b) No national under eighteen years of age can expatriate himself under subsections (b) to (g), inclusive, of section 801. Oct. 14, 1940, c. 876, Title I, Subchap. IV, Sec. 403, 54 Stat. 1169.”

J.

U. S. C. A. Title 8, Sec. 804. Expatriation of Naturalized Nationals by Residence Abroad.

“A person who has become a national by naturalization shall lose his nationality by:

(a) Residing for at least two years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, if he acquires through such residence the nationality of such foreign state by operation of the law thereof; or

(b) Residing continuously for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 806 hereof.

(c) Residing continuously for five years in any other foreign state, except as provided in section 806 hereof. Oct. 14, 1940, c. 876, Title I, Subchap. IV, Sec. 404, 54 Stat. 1170.”

* * * * *

K.

U. S. C. A. Title 8, Sec. 808. Exclusiveness of Means of Losing Nationality.

“The loss of nationality under this chapter shall result solely from the performance by a national of the acts or fulfillment of the conditions specified in this chapter. Oct. 14, 1940, c. 876, Title I, Subchap. IV, Sec. 408, 54 Stat. 1171.”

L.

Immigration and Nationality Regulations.

"315.9. *When evidence overcomes presumption; effect of decision.* When the United States diplomatic or consular officer or immigration officer is satisfied that the evidence presented overcomes the presumption of expatriation under section 402 of the Nationality Act of 1940, the United States passport or other travel document of the person shall be endorsed by or on the part of such officer with a certificate as follows:

I certify that the holder of this (passport) has submitted to me evidence which I believe to be sufficient to overcome, *as of this date*, the presumption of expatriation under section 402 of the Nationality Act of 1940." (Italics ours.) (*Immigration and Nationality Regulations*, Section 315.9.)

M-1.

The Bulletin of the State Department Containing Information for Bearers of Passports Contains the Following Administrative Statement Regarding Dual Nationality:

"20. Dual Nationality.

Persons born in the United States of unnaturalized parents acquire the nationality of the country of which their parents are nationals. Often foreign nationality is retained notwithstanding the subsequent naturalization as citizens of the United States. A person possessing the nationality of both the United States and a foreign country, who habitually resides in the territory of such foreign country and who is in fact most closely connected with that country should not expect to receive the protection of this Government while he is residing in such country,

and it is not the practice of the Department to make representations in his behalf with a view to his release from the performance of military or other obligations to the foreign country." [Exhibit DR.]

M.

Abstract of Passport Laws and Precedents

(Passport Division Office Instructions)

SECTION I

Code No. 1.6

May 19, 1941

SUBJECT: DUAL ALLEGIANCE (Supersedes code of same number dated July 30, 1937.)

1. *General.* There is no uniform rule of international law covering the subject of citizenship. Every nation holds for itself who shall, and who shall not, be its citizens. According to the law of some states, citizenship by birth depends upon the place of birth. This is the *jus soli*, or common law doctrine. According to the law of other states, citizenship depends upon the nationality of the parents. This is the *jus sanguinis*,—sometimes erroneously termed the doctrine of the law of nations, because it obtains in many countries. In some countries both elements exist, the one or the other, however, predominating. By the law of the United States, citizenship depends, generally, on the place of birth; nevertheless the children of citizens, born out of the jurisdiction of the United States, are also citizens. The existence of these two doctrines, side by side, in this country, is the cause of much of the confusion which has arisen in relation to citizenship in the United States. (Van Dyne, *Citizenship of the United States*, pp. 3-4.)

The principles of *jus soli* and *jus sanguinis* are followed to a large extent by the United States. How-

ever, it should be observed that neither of the two doctrines is adhered to in its fullest extent in the United States. The confusion growing out of the existence of these distinct doctrines of nationality has been the cause of numerous difficulties which have arisen from time to time between the United States and foreign countries because of the conflict in the bases of the laws pertaining to nationality. While a person who has dual nationality resides in the United States, the right of the United States to his allegiance is paramount to the right of the other country of which he may be a citizen. Conversely, while a person who has dual allegiance is residing abroad in the country to which he owes allegiance is paramount to that of the United States. However, it has been the policy of this Government when occasion arises to intercede in behalf of a person who has dual allegiance, one of which is American, when the facts clearly indicate that his habitual place of abode over a period of years has been in the United States and he has been molested by the authorities of the foreign country of which he is also a citizen while temporarily visiting or sojourning in such country.

2. *Registration and issue of passports abroad in dual nationality cases.* In general, in the case of a person who acquired at birth the nationality of the United States and of a foreign state, a passport may be authorized for use in traveling forthwith to the United States for permanent residence, unless, of course, such individual has lost his American nationality under the first paragraph of Section 2 of the Act of March 2, 1907, or Chapter IV of the Nationality Act of 1940, without regard to the length of his foreign residence. However, if such a person has reached

the age of majority and is domiciled in the foreign country of which he is a national, and applies for a passport, not for the purpose of coming to the United States to reside, but for the purpose of continuing his residence indefinitely in such other country, a passport will not as a rule be issued.

Passports will, as a general rule, be issued to persons residing in a country other than the country of their parent's nativity for further residence abroad unless facts in the case other than the fact of mere residence make it inadvisable to issue passports to such persons. Of course, if the residence abroad has been extended for such a period that it is indicated that residence in and allegiance to the United States have been abandoned, a passport should not be issued.

The same principles as apply with respect to applications for passports shall apply also to applications for registration.

R. B. SHIPLEY,
Chief, Passport Division

PD

Department of State, U. S. A.
Washington 25, D. C.

Official Business

[Stamped]: Washington, D. C. 28, Aug. 13, 11 P. M.
1948

Mr. Morris Lavine,
Care of the Clerk of the United States District Court,
Los Angeles, California

See *Perkins v. Elg*, 307 U. S. 325; *Savornan v. U. S. A.*, 94 L. Ed. (Adv.) 203.

N-1.

The language and face of the indictment, starting with the beginning of the indictment to the overt acts is as follows:

In the District Court of the United States in and for the Southern District of California Central Division.

United States of America, Plaintiff, v. Tomoya Kawakita, Defendant. No. 19665.

INDICTMENT

(U. S. C., Title 18, Sec. 1; U. S. C.,
Title 28, Sec. 102—TREASON)

The grand jury for the Southern District of California, Central Division, having been impanelled for the February, 1947 term, and having commenced an investigation concerning the matters contained in this indictment, and not having completed the same during said term, and not having been discharged, and a District Judge having upon request of the District Attorney by order authorized said grand jury to continue to sit during the term succeeding the February 1947 term to finish the investigation theretofore begun, now returns this indictment pursuant to Title 28, U. S. Code, Sec. 421 and Rule 6 of the Rules of Criminal Procedure for the District Courts of the United States.

The grand jury charges:

(1) TOMOYA KAWAKITA, the defendant herein, was born at Calexico, California, on September 26, 1921, and he has been at all times herein mentioned and now is a citizen of the United States of America and a person owing allegiance to the United States of America.

(2) At all times mentioned herein Camp Oeyama was a camp for prisoners of war maintained by the Japanese Government and located on the Island of Honshu, Japan;

At all times mentioned herein Nippon Yakin Kogyo Kabushiki Kaisha was a corporation organized and existing under and by virtue of the laws of Japan, and also known as the Nippon Metallurgical Industry Co., Ltd., and will be hereinafter referred to as the company; that the company owned, operated and controlled on the Island of Honshu near Camp Oeyama an open pit ore mine, and an ore smelter commonly referred to as the "factory."

That during the times referred to herein the work and services of prisoners of war who were members of the armed forces of the United States, and who were imprisoned at Camp Oeyama, were used and utilized by the company and by the Japanese government at the said open pit ore mine and at the smelter.

That at all times mentioned herein the company was engaged in the business of producing and supplying minerals and products to agencies of the Japanese government and that the minerals and products of said open pit ore mine and the said smelter produced by the company were used in the manufacture of arms, materials and munitions of war by and for the Japanese government.

(3) The defendant TOMOYA KAWAKITA, at and near the said Camp Oeyama and said open pit ore mine and smelter in Japan, and outside the jurisdiction of any particular state and district of the United States, continuously and at all times from August 8, 1944, up to and including August 24, 1945, under the circumstances and conditions and in the manner and by the means hereinafter set forth, he then and there, being a citizen of the United States and a person owing allegiance to the United States, in violation

of said duty of allegiance, did knowingly, intentionally, willfully, and unlawfully, feloniously, traitorously, and treasonably adhere to the enemies of the United States and more particularly namely: the Government of Japan, with which the United States at all times since December 8, 1941, and during the times set forth in this indictment, has been at war, giving to the said enemies of the United States aid and comfort in Japan, that is to say:

(4) The aforesaid adherence of said defendant TOMOYA KAWAKITA and the giving of aid and comfort by him to the aforesaid enemies of the United States during the period aforesaid consisted of serving as interpreter and foreman at the said prisoner of war camp at Oeyama and at the said open pit ore mine and smelter, and, in his said capacity as interpreter and foreman, of compelling members of the armed forces of the United States who were then and there held by the Japanese Government as prisoners of war to perform labor at the said open pit ore mine and smelter, and of directing and assisting the Japanese military forces having charge of the prisoners of war at said Camp Oeyama in the imposition of discipline and punishment on said members of the armed forces of the United States, and of beating, abusing, and attempting to destroy the morale and the physical and mental well-being of, the said members of the armed forces of the United States.

The aforesaid activities of said defendant TOMOYA KAWAKITA were intended to and did assist the Japanese Government to utilize members of the armed forces of the United States to produce minerals, metals, and products to be used in the manufacture of arms, material, and munitions of war for the Japanese Government and were further intended to and did assist the Japanese military au-

thorities to control and discipline members of the armed forces of the United States who were then and there prisoners of war at said Camp Oeyama and to render them abjectly subservient.

(5) The said defendant TOMOYA KAWAKITA, in the prosecution, performance, and execution of said treason and of said unlawful, traitorous, and treasonable adhering and giving aid and comfort to the enemies of the United States aforesaid, at the several times hereinafter set forth in the specifications hereof (being times when the United States was at war with the Government of Japan), did unlawfully, feloniously, traitorously, and treasonably, and with treasonable intent to adhere to and give aid and comfort to said enemies, perform, do, and commit certain overt and manifest acts which gave aid and comfort to said enemies, that is to say:

N-2.

The Eight Overt Acts Found by the Jury.

(a) Defendant, TOMOYA KAWAKITA, on a date in May, 1945, the exact date of which is to the grand jury unknown, at the said smelter operated by the company near Camp Oeyama, did direct the work of Phillip D. Toland, a member of the armed forces of the United States who was then and there a prisoner of war, to compel him to remove rock from the roadbed and track of a railroad used in the operation of said smelter, and did kick the said Phillip D. Toland to compel him to greater exertion in said work.

(b) Defendant TOMOYA KAWAKITA, during the latter part of April, 1945, the exact date of which is to the grand jury unknown, at said Camp Oeyama did direct and participate in the following inhuman and degrading punishment of one, J. C. Grant, a member of the armed forces of the United States who was then and there a prisoner of war at said Camp Oeyama; said J. C. Grant was knocked into the drain or cesspool of said camp by his Japanese guards and was repeatedly and violently struck and beaten by the defendant and the said Japanese guards as he attempted to get out of the pool, thereby sustaining injuries, shock and exposure.

(c) During December, 1944, at Camp Oeyama, on a date to the grand jury unknown, the defendant TOMOYA KAWAKITA and the Japanese guards did line up about thirty members of the armed forces of the United States who were then and there prisoners of war in Camp Oeyama and as punishment of said prisoners of war for making mittens and shoe linings from pieces of blankets for protection from cold weather conditions and did at said time and place strike and beat them and force them to strike and beat each other.

(d) During August, 1945, the exact date of which to the grand jury is unknown, the defendant TOMOYA KAWAKITA, at Camp Oeyama, did impose punishment on one Thomas J. O'Connor, a member of the armed forces of the United States and then and there a prisoner of war in said camp, for a breach of camp rules by assaulting, striking, and beating said Thomas J. O'Connor and re-

peatedly knocking him into the drain or cesspool of the said camp, causing the said Thomas J. O'Connor temporarily to lose his reason.

(g) On a date in July or August, 1945, the exact date of which is to the grand jury unknown, a work detail consisting of members of the armed forces of the United States who were then and there prisoners of war at said Camp Oeyama, including in their number one David R. Carrier and George W. Simpson, returned thirty minutes early from their assigned duties as such prisoners of war and were compelled by the Japanese sergeant in charge to run twice around the inner quadrangle of the buildings of said camp and thereafter the defendant TOMOYA KAWAKITA did compel the said David R. Carrier and George W. Simpson, who were unable to run fast enough by reason of illness resulting from their captivity, to run an additional four times and six times respectively around said quadrangle of said camp.

(i) That on or about December 17, 1944, at or near the said open pit ore mine, the defendant, TOMOYA KAWAKITA, did order and compel Johnie T. Carter, then and there a member of the armed forces of the United States and a prisoner of war at Camp Oeyama, to carry a heavy log up an ice-covered slope; that the said Johnie T. Carter, who was then and there suffering from malnutrition and in a weakened physical condition, slipped and fell and received a serious spinal injury; that the defendant, TOMOYA KAWAKITA, then and there denied medical care

to the said Johnie T. Carter and delayed his removal to Camp Oeyama for a period of approximately five hours.

(j) On a date in May, 1945, the exact date of which is to the grand jury unknown, the defendant TOMOYA KAWAKITA, at a warehouse near Camp Oeyama, did order and commit John J. Armellino, a member of the armed forces of the United States, who was then and there a prisoner of war at said Camp Oeyama, and weak and emaciated, to carry for a distance of approximately 500 feet two heavy buckets of white lead instead of one bucket which Armellino had been carrying, and did then and there strike and beat the said John J. Armellino in order to compel him to perform this labor.

(k) That on a date in the late spring or early summer of 1945, the exact date of which is to the grand jury unknown, the defendant, TOMOYA KAWAKITA, within the confines of Camp Oeyama, did participate in and assist Japanese military personnel of Camp Oeyama in directing and executing the following cruel, inhuman, and degrading punishment of Woodrow T. Shaffer, a member of the armed forces of the United States who was then and there a prisoner of war of the Japanese government at Camp Oeyama, to-wit, the said Woodrow T. Shaffer was forced to kneel for several hours on a platform with a stick of bamboo placed on the inner side of the joints of his knees and to hold at arms length above his head a bucket of water and subsequently a heavy log, and was then and there struck and beaten by the said TOMOYA KAWAKITA.

O.

Summary of the Testimony and Page References as
to Each Overt Act.

NOTE: All references to Rep. Tr. are the page where the testimony as to that incident begins.

OVERT ACT (a).

*PHILIP D. TOLAND (Overt Act A)

Philip D. Toland testified [Rep. Tr. 1642] that around the springtime of 1945, approximately the month of June, at a point which he marked with a "T" [marked Exhibit A] on the map, he was working on a detail, lifting ore rock away from the track and keeping it clear for the other trains to get by, and he slowed down for a moment. He said he got a dizzy spell and Kawakita came up and told him to get to work, and kicked him, and he fell on his face, cut it and the palm of his hand. [R. 1644.] He said Spurlock came up to pick him up and Kawakita said "let him pick himself up." On cross-examination he said he was working on the garden detail and also on the ore work detail in 1945, and that he was quite sick. [R. 1667.] He said Dr. Bleich examined him and treated him, and that he answered sick call the night before [R.

*It will be seen from the above that no two people identified point "T" as the place where the alleged overt act occurred; that no two persons fixed the specific time, day or date when it occurred; it was always "around May" or "approximately May 15, 1945" or around about the Spring, etc., and according to Toland he was the only one who fixed it in June. While the card records of Dr. Bleich show that from April 21, 1945 until the close of the fighting that Toland was working on the garden detail and was not lifting any ore rock at all.

This character of testimony certainly is not the *two direct witness* type of testimony which the Constitution requires to be proved with specificity beyond a reasonable doubt.

1669]. That the work hours were that they left the camp about seven o'clock in the morning [R. 1669] in military formation, and would go to the factory area when they worked in the factory area [R. 1670]. That at the time of the alleged occurrence, he had stopped working and was doing nothing. He had just got a dizzy spell and stood up for a moment until he got over it [R. 1670]; that this took about three minutes, and during the three minutes he was not working [R. 1671]. It was in the afternoon. He did not recall whether he had seen Sgt. Ichaba (the Sergeant in charge of the camp) around the camp at the time he was there [R. 1673]; he could not seem to place his face [R. 1673]. He recalled Akamatsu (another Sgt. in charge of the camp); he might have seen him around the camp once or twice within the time he was on sick call [R. 1673]. He did not remember the Japanese Officer in charge of the detail [R. 1677]. In November 1945, he made a statement on his return to the United States regarding what happened to him in the camp [R. 1649]. In that statement he did not mention Kawakita [R. 1649, 1650]. Although he was shown the statement two weeks before he testified, he could not recall what was in it [R. 1652]. [Exhibit AG in evidence—Statement made November 16, 1945—R. 1654]. He said he made the statement in November 1945. He was shown a number of the pictures of the Japanese personnel and could not identify them [R. 1658, 1659, Exhibits B, C, D, E, F, and G and H, R. 1660, 1661].

Frank E. Mino, who had been under shock treatment and had been under the care of psychiatrists for mental illness [R. 817], growing out of the war, was permitted to testify, over objections, regarding the alleged occurrences, and his testimony was not stricken; nor was the jury given

any instructions as to how to consider the testimony of insane persons [Refused Instruction No. 159, Clk. Tr. p. 277]. He testified that approximately May 15, 1945, he saw the defendant have a conversation with Toland and in a few minutes kick him. On cross-examination [Rep. Tr. p. 845] he testified there might have been a Japanese guard with Toland's detail but he did not hear what was said between the defendant and Toland. That he did not go over to assist Toland nor did he report the incident, and that Spurlock picked Toland up. He said nothing about Kawakita in his statement to the army on August 15, 1945 [Defendants Exhibits AD] although he told the fantastic tale about:

“One day while working in the steel mills men were talking to a Japanese guard. They blamed it on me for their talking and clubbed me on the top of my head, causing a gash in my head about three inches wide and about two inches deep. Our medical doctor, Captain Blick, worked on me, giving me treatments for my head.”

He said:

“Many men were killed at the factory, made to be accidents but weren't and every time a man was killed Captain Mongo, in charge of the camp, would tell the men it was their own fault, accidents, but I saw Japanese push men in hot blazing steel.”

FRANK E. MINO testified [Rep. Tr. 791 *et seq.*] “approximately May 15, 1945” he saw the defendant have a conversation with Toland and in a few minutes kick him. On cross-examination [Rep. Tr. 845] he testified that there might have been a Japanese guard with Toland's detail; that he did not hear what was said between the defendant and Toland; that he did not go over to assist

Toland nor did he report the incident. Spurlock picked Toland up.

NATHAN SUTTON testified [Rep. Tr. 728 *et seq.*] that “around May” of 1945 “couldn’t truthfully state ‘time of day’ ” he saw the defendant talking to Toland and kick Toland as he stooped to pick up a rock. He marked a different place on the map, Exhibit 24a, where it allegedly occurred.

GID H. SPURLOCK testified [Rep. Tr. 1082 *et seq.*] that “About around the spring” of 1945 “around in May” he was working with Toland cleaning rocks off the railroad tracks when the defendant “come by and kicked and pushed him down on his face”; that he started over to pick Toland up and defendant told him to leave Toland alone.

ALEXANDER HOLIK testified [Rep. Tr. 1402 *et seq.*] that “around May 1945” he was working with Toland cleaning rocks off the tracks; that he saw the defendant “mumbling to Toland” and “the first thing I knew he kicked him and pushed him over on his face.” On cross-examination [Rep. Tr. 1418 *et seq.*] he admitted that he did not see what began the incident; that he did not hear what was said.

THE DEFENDANT testified [Rep. Tr. 4106] that he did not kick, hit or shove Toland. That in May 1945 he was doing clerical work in the warehouse office at the *factory*. A copy of his worksheet showing his clerical work was introduced as an exhibit. [Ex. DK; R. 3802.]

DR. LE MOYNE BLEICH testified he examined the men each day to determine if they were fit for work. [Rep. Tr. 3352 *et seq.*] Dr. Bleich further testified that he did not let men go out who were not fit for work and that

Toland was on rest over several periods of time. He testified that from April 21 until August, that Toland was on light work duty in the garden, according to his card records.

OVERT ACT (b).

J. C. GRANT (Overt Act B).*

J. C. GRANT testified [Rep. Tr. 1915] that on a date he couldn't tell, but in the month—it must have been about the latter part of April or the first part of May—in Camp Oeyama about four or five-thirty in the afternoon [Rep. Tr. 1915, 1916], while he was resting, he went to the Red Cross storeroom where they had Red Cross supplies and ate his fill and got some cigarettes and chocolate bars and came outside and dropped a package of cigarettes, and one of the sentry noted that he dropped something and asked him what it was. Grant told him and the sentry called Akamatsu, the Sergeant who was on duty at the Camp that day. [Rep. Tr. 1916.] After the sentry called Akamatsu he come running out roaring like a lion with his wooden saber, slapped him around and beat him up and then Ichiba Goonso also came running out then. [Rep. Tr.

*This overt act was a summary punishment of Grant imposed by the Japanese Sergeants, Ichiba and Akamatsu, at the camp for Grant's stealing and breaking into and getting scarce rationed food.

There was no specific date or time; it is uncontradicted from the records and the testimony of the defendant as well as others that Kawakita was working as a clerk in the factory and the quitting time at that work was five p. m. All of the witnesses placed the occurrence around four o'clock on an uncertain day.

This is not either the kind of act nor the type of thing that is "treason" nor the kind of testimony that would support the Constitutional mandate of two witnesses to the same overt act with specificity.

1927.] It was one of the sergeants that was there—Ichiba or Akamatsu—that ordered him over by the cesspool; he was knocked into the cesspool by Akamatsu, and was ordered out of the cesspool by Akamatsu; then Ichiba Goodso had a stick of wood and was fixing to knock him back into the cesspool with a piece of wood and he ducked that and Akamatsu knocked him back again with his fist. [Rep. Tr. 1917-1918.] He was repeatedly knocked in again by Akamatsu every time he was ordered out and he was dazed. Just about that time the working party came in at the time that Akamatsu and Itchiba were working on him. [Rep. Tr. 1918.] He didn't see what the defendant did after he came in. [Rep. Tr. 1918.] He remembers that Itchiba and Akamatsu were giving him the works for the burglary and breaking into the storehouse, but he couldn't tell anyone's name that was around. He remembers seeing several others around the pool besides the Japanese. Captain Bleich, the camp doctor, was trying to pull him out and he had severe cramps. [Rep. Tr. 1920.] He was finally ordered out by Itchiba and carried back to the camp office. [Rep. Tr. 1921.]

On cross-examination, Grant admitted that the occurrence took place about 3:30 or 4:00 o'clock in the afternoon. [Rep. Tr. 1927, 1928.]

DAVID R. CARRIER testified [Rep. Tr. 366 *et seq.*] that in May 1945 around 4 o'clock in the afternoon he heard a commotion outside and went to the door where he saw Ichiba, Akamatsu, 2 or 3 others and the defendant talking to Grant. That he saw the defendant strike Grant twice after which Ichiba and Akamatsu shoved Grant into the cesspool. A Japanese guard then ordered him back inside. He could not hear what was said and did not know

what had caused the commotion but did know it was a serious offense to steal any food.

WILLIAM GAGE, JR. testified [Rep. Tr. 886 *et seq.*] that the middle of May, 1945 when he returned from the factory at between 4:30 and 5:00 in the afternoon his detail was lined up facing the cesspool; were told an American had been caught stealing American Red Cross chow out of the storehouse and was being punished. He then left the detail to see the doctor and later in the afternoon again saw Grant at which time he was in the pool and Akamatsu, Ichiba and Kawakita had long bamboo poles and were whacking Grant over the head with them. The defendant and other Japanese were talking and laughing. On cross examination the witness testified [Rep. Tr. 943] that there were regulations against stealing and in addition the Americans were under strict orders not to eat anything raw for their own health's sake. He saw Ichiba, defendant, Akamatsu and several other Japanese guards strike Grant. Dr. Bleich was there "taking it all in when I walked up there."

MORTON FEINBERG, testified [Rep. Tr. 965 *et seq.*] that "sometime in April of 1945." "The approximate time was three or four in the afternoon" he heard a commotion in the center of camp and went out there where he saw "Grant standing at attention there, and Akamatsu was out there, Ichiba, Kawakita, Harvey who was an Englishman, and Tugby who was a Canadian, and they were screaming at him in Japanese." "And the next thing I knew they were punching him. Akamatsu punched him. Ichiba punched him. Harvey and Tugby and Kawakita punched him. Then they started to knock him into the pool." He did not know if the Japanese was interpreted or not. [Rep.

Tr. 1044.] Grant was knocked into the pool five or six times by Akamatsu and Ichiba. [Rep. Tr. 1047.] Grant told the witness he was being punished for stealing American cigarettes and chocolate bars. [Rep. Tr. 1049.]

GID H. SPURLOCK, testified [Rep. Tr. 1084 *et seq.*] that “around in April” of 1945 he marched into camp from the factory and lined up with the rest of the detail facing the pool where Grant was standing with some Japs, not the defendant who had come in with them. [Rep. Tr. 1086.] One of the Japs, not the defendant, pushed Grant into the pool. He saw the defendant hit Grant over the head with his saber. On cross examination he testified [Rep. Tr. 1130] that he did not hear any of the conversation; that he could not remember who was present.

GEORGE V. MAYO, testified [Rep. Tr. 1161] that “Some-time in April or May of 1945” he heard a commotion outside and stepped out and saw Grant in the cesspool and saw the defendant and two or three other Japanese standing around the pool and saw the defendant strike Grant. He found out that Grant was being punished for stealing.

ALEXANDER R. HOLIK testified [Rep. Tr. 1404] around April, 1945 between five and six in the evening he heard “yap-yap” outside and went out and saw a bunch of Japanese working over Grant dragging him over to the cesspool; the defendant was not present then but later he saw the defendant shove Grant into the pool and swing his saber at him a couple of times. He couldn’t name anyone else who was there. [Rep. Tr. 1446.]

JAMES T. PHILLIPS testified [Rep. Tr. 1510] that some-time in May or June, 1945 about 4:30 or 5:00 in the evening he heard a commotion and saw a Jap take Grant around by the pool and saw Akamatsu and Ichiba and

three or four more Japs come running down to the pool where Akamatsu and Ichiba hit Grant knocking him into the pool. He then saw Harvey, Tugby, Dean, the defendant and some others come over and saw the defendant strike Grant and push him into the pool. He heard the defendant ask Grant why he had broken into the store-room. On cross examination he testified [Rep. Tr. 1543] that they had been told there would be serious punishment for anybody who stole food. Dr. Bleich was there but did not say anything that he heard.

PHILIP D. TOLAND testified [Rep. Tr. 1645] that "Around the month of May" 1945 he saw the defendant push Grant's head into the water with a long wooden stick. He did not remember who else was present.

Toland could not recall whether he saw Sgt. Ichiba in the camp during the time he was there [Rep. Tr. 1673]; he couldn't seem to place his face. He did not recall Akamatsu, or seeing Akamatsu around the camp. [Rep. Tr. 1673.] He might have seen him once or twice; he did not recall an Englishman named Harvey or another Englishman named Tugby, or a Warrant Officer named Dean, or Chief American Petty Officer named McElheny around the pool at the time Grant was there. [Rep. Tr. 1674.] He heard Harvey's voice at the time Grant was at the pool; he did not see Dr. Bleich around. [Rep. Tr. 1674.] He saw slapping by Japanese Americans as punishment. [Rep. Tr. 1675.]

DAVID D. HUDDLE testified [Rep. Tr. 1718] that "This particular instance happened in April 1945" around 4:30 or 5:00 in the afternoon when he saw the defendant hit Grant over the head with a wooden sword. He could not remember who else was present [Rep. Tr. 1744] but later

when he returned he saw Ichiba, Akamatsu and others there. [Rep. Tr. 1747 *et seq.*]

JOHN L. MCCOY testified [Rep. Tr. 1780] that "at between 4:00 and 6:00 o'clock, I would say, in the months of April or May" 1945 he saw Grant standing by the pool with the defendant, Ichiba, Harvey and a couple of other Japanese standing on the side of the pool. The defendant hit Grant on the head with a wooden sword. Grant told the witness he was being punished for stealing from the Red Cross storehouse. [Rep. Tr. 1810.] He did not report the incident to the military authorities. [Rep. Tr. 1811.]

JAMES A. CAIRE testified [Rep. Tr. 1984] that the latter part of May, 1945 after 4:00 o'clock he heard commotion and looked out and saw Grant by cesspool with 2 or 3 Japanese and defendant came up to group and started talking to Grant and then hit him, knocking him into the pool, and then keeping him there with his wooden sword. Akamatsu and Ichiba was in the group.

WOODROW T. SHAFFER testified [Rep. Tr. 2049] that in the latter part of April, 1945 about 4:30 he saw a commotion over by the pool and saw Grant, Ichiba, Akamatsu, the defendant, Tugby, Harvey and several Japanese there. Ichiba struck Grant knocking him into the pool. The defendant told Grant to submerge and the defendant and Ichiba struck Grant with sticks when he refused to submerge.

DR. LEMOYNE C. BLEICH testified [Rep. Tr. 3380] that he saw a part of the Grant incident. Grant asked him to do something about it and the witness told him all that he could do was to keep moving in the water. The witness

was not allowed to stay long as Ichiba made him get away. He remembered Harvey was there also but could not remember the names of any others. He knew Grant was being punished for stealing.

THE DEFENDANT testified [Rep. Tr. 4107] that he did not direct or participate in the punishment of Grant; that he did not strike, beat or hit him. In April of 1945 he was working as a clerk at the factory. The work hours were from 7:30 to 5 p. m. and by the time he left it was 5:10 p. m. or later. He only went down to the camp once or twice a month [Rep. Tr. 4102] during the period from March 1 to August 15th, 1945.

SACHIO OGUNI testified by deposition, that Interpreter Kawakita Fujiawa was present, and that was not there. [Ex. AV in evidence.]

OVERT ACT (c).* (Destruction of Blankets.)

NATHAN SUTTON testified [Rep. Tr. 731] that in December 1944 some men came through the han calling cer-

*It will be noted that the foregoing overt act, according to the different witnesses, occurred at the camp at an indefinite date in December, 1943, "sometime before Christmas," "sometime after Christmas," "sometime around the middle of December," etc.

It will also be noted that at that time Kawakita was an interpreter at the mine and that the mine trains, according to all the testimony, and the testimony of Carter who complained in overt act (i) that he was not moved because the trains did not leave the mine until five o'clock. Hence, it was physically impossible under all of the evidence for Kawakita to have been at the camp where the beatings took place for cutting up blankets and at the mine—an hour's distance by train—at the time.

It will also be noted that all of the testimony was uncertain as to dates, times, places and personnel.

Furthermore, it was a form of punishing each other for a serious violation of the government laws of Japan, to-wit, cutting up blankets, which were scarce.

tain names, his included. They were taken outside and told to stand in two files. There were about 30 men lined up. They were told they had misused Japanese Government property. The defendant was present. An Englishman went down the line slapping each one. Then Harvey went down the line socking them. Finally the defendant went down the line but did not go far. [Rep. Tr. 735.] Then the men in the front rank were told to face the men in the rear rank. They were then told to punch each other which they did. [Rep. Tr. 738.] The Japanese guards moved around and if they were not hitting each other hard enough they were socked on the head with a stick or gun barrel. The defendant also struck some of the men. Some of the men acknowledged that they had cut up blankets. [Rep. Tr. 748.] Ichiba and Japanese Military officers were present. Specific instructions had been given not to cut up blankets. [Rep. Tr. 753.] The prisoners of war had cut up the blankets to make scarves, socks etc. [Rep. Tr. 754.] No other punishment was given for cutting up the blankets. [Rep. Tr. 762.]

GID H. SPURLOCK testified [Rep. Tr. 1091] that in December 1944 about 20 men were made to face each other and beat each other. The defendant, Tugby, Fujisawa and Gammy were present. He saw the defendant hit three or four men. He did not know who gave the orders to strike each other. He saw the Japanese military guards moving about. No other punishment was given for cutting up the blankets. [Rep. Tr. 1141.]

MAURY RICH testified [Rep. Tr. 1337] that sometime between December and March a few of the Americans were cutting up blankets for leggings and mittens. The Japanese found the cut up blankets. 26 or 30 men were

made to line up in two ranks and punch each other. The defendants struck several of the men. He did not know who gave the orders. [Rep. Tr. 1390.]

JAMES T. PHILLIPS testified [Rep. Tr. 1519] that after Christmas of 1944 he heard a commotion outside and went out where he saw 20 or 25 or 30 men lined up facing each other. Akamatsu, Ichiba and six or seven other Japanese, including the defendant, were running up and down the line making the Americans strike each other and if they did not hit hard enough the Japanese would haul off and hit them. Harvey (British), Tugby (Canadian) and McElhaney (American) were also taking part. He did not hear of any other punishment for cutting up blankets. [Rep. Tr. 1589.]

JOHNIE T. CARTER testified [Rep. Tr. 1838] that the defendant hit him across the back and head because he was not hitting the man in front of him hard enough. On cross-examination [Rep. Tr. 1865] he testified that he saw very few beatings and that American prisoners of war were beaten "Only in case that they brought it upon themselves." He had done the sewing on the blankets after they were cut up.

WOODROW T. SHAFFER *testified* [Rep. Tr. 2052] that around the middle of December 1944 his number was called to form in front of the Japanese office "there was 29 other men" besides himself. They were lined up in two ranks of 15 men facing the office. They were told they were to be punished for destroying Japanese Government property. [Rep. Tr. 2054.] Tugby, Harvey, the defend-

ant, and Japanese guards were present. The defendant told the British quartermaster to go down the line striking each man. The defendant about faced the front rank and told the men to pair off and strike and fight with one another. The defendant, Tugby and the Japanese guards struck several of the men.

ROBERT WILLIAM GAYLER testified [Rep. Tr. 2340] that shortly before or after Christmas, 1944, the defendant, Ichiba, the Japanese quartermaster sergeant and one or two others, being present, 26 or 30 prisoners of war were lined up in single rank while the defendant talked to them about the blankets. Then the defendant had them line up in two ranks facing each other and told the British quartermatser sergeant to go down the line hitting each one and then told the men to start slapping each other. The defendant also told them they were not hitting hard enough and to use their fists. He had seen other Japanese military personnel strike other military personnel. [Rep. Tr. 2383.]

WILBURN VAN BUSKIRK testified [Rep. Tr. 2540] that before Christmas, sometime in December, 1944, blankets were found which were cut up into socks and mittens. Between 20 and 30 men were lined up in front of the barracks. Tugby, Akamatsu, Ichiba, the defendant and a couple of other guards were present. An Englishman was told to go down and slap everybody which he did. The defendant told him to do it. The defendant hit a man and knocked him down. The men were then struck by Ichiba, Akamatsu and several of the guards. Then the

defendant told the men to about face and to slap each other which they did. On cross examination the defendant testified that he had cut up blankets but was not caught. [Rep. Tr. 2661.] That he knew it was against the regulations.

DR. LEMOYNE BLEICH testified [Rep. Tr. 3384] that he saw a group of 12 to 20 or 25 men lined up on the parade ground facing each other and made to slap each other. They were being punished for cutting up blankets. He did not remember who the Japanese personnel were who were present.

MEILI FUJISAWA *testified* [Rep. Tr. 3641] that he saw the incident of men beating each other up or striking each other. He thought it was in 1943. He was not sure if the Americans were there or not. He had a discussion with Ichiba regarding punishment for cutting up blankets. It might have been 1944 because Ichiba was there and he may have come the first or middle part of 1944. [Rep. Tr. 3649.] He could not remember who was present except for British NCA Yerling. He did not see the defendant there. [Rep. Tr. 3650.] Ichiba said that any person destroying government property would be severely punished and they will punish each other.

THE DEFENDANT testified [Rep. Tr. 4107] that he had nothing to do with the punishment of the men for cutting up blankets. In December 1944 he was working at the mine, which was an hour away by train, and was not at the camp.

OVERT ACT (d).* (Thomas J. O'Connor.)

THOMAS JOHN O'CONNOR testified [Rep. Tr. 2100] that "around the end of June or middle—beginning of August or July, end of June or beginning of July, around that time" of 1945 Rael, Floyd and he broke into the warehouse. Around 1:00 o'clock the same day the Japanese took an inventory and found the stuff missing. Rael and Floyd were caught "right off the bat." Akamatsu, the defendant, Ichiba and a crippled Japanese soldier were striking Floyd and Rael. After about 10 minutes they divulged my name and I was taken out in front of the cesspool where Ichiba hit me. Akamatsu hit him and knocked him into the pool. The defendant struck him the third time. [Rep. Tr. 2105 & 6.] After that they just took turns. On cross-examination he testified that in the statement given to the Navy he only mentioned Ichiba and Akamatsu and not the defendant.

ALBERT M. ENNIS testified [Rep. Tr. 595] that the last part of July, 1945, around 2:30 in the afternoon, he heard

*It will be noted that this also was a summary punishment of O'Connor for burglary and stealing. Meiji Fujisawa testified that he was acting as interpreter at the camp at the time and questioned Rael, who admitted taking things from the storehouse. He did not see the defendant there. [R. 3641.] The defendant testified that he was working at the factory as a clerk at the time and was not at the camp.

Comparing the time of the occurrences and the summary nature of the punishment, this was not "treason." It may be noted that several witnesses testified that the Japanese punished their own people summarily by slapping. [Toland, R. 1675; Grant, R. 1925.]

It will be noted that the time of this occurrence varies from right around noon to three or four o'clock and that the date was all different by different witnesses. There were no two witnesses to the identical date, the identical place, the identical occurrence.

a commotion in the street and went out to see what was going on. He found O'Connor, Rael and Floyd lined up beside the cesspool. The defendants, Ichiba, Tugby and Harvey were there. Ichiba struck each of the three men. Defendant struck each of the three men knocking O'Connor into the cesspool. He did not hear any conversation at the pool.

PAUL L. SARNO testified [Rep. Tr. 658] that about the last week in July, about 1:00 or 1:30 he heard a big commotion outside and went out. He saw Floyd and Rael standing there with Ichiba and Akamatsu hollering and striking them and knocking them into the pool. He then saw Tugby and Harvey and defendant approaching. When they got to the pool he saw their lips moving but could not hear what was said. Akamatsu, Ichiba, the defendant, Tugby and Harvey were striking O'Connor, knocking him into the pool. He did not say anything in his statement to the authorities about the defendant. [Rep. Tr. 688.]

MORTON FEINBERG testified [Rep. Tr. 968] that about July 21st between 3:00 and 4:00 in the afternoon Harvey and Tugby were going around trying to locate some Red Cross supplies which had been stolen. They found Rael and Floyd and took them out to the cess pool. Akamatsu, Ichiba, the defendant and some guards were present. After beating Rael and Floyd for about 20 minutes they found out about O'Connor and got him. They beat the three of them up and threw them in the pool. Akamatsu had a shoe and was beating him with it and the defendant hit him a few times. On cross-examination he testified that there were strict orders about not breaking into the Red Cross storehouse. [Rep. Tr. 1052.] Every one understood they would be severely punished if they did. He did not

make any reports to the American military authorities when they took over the camp. [Rep. Tr. 1061.]

JAMES T. PHILLIPS testified [Rep. Tr. 1524] that sometime in August, 1945, "right at noon" the bell rang for the men to fall out. They all lined up and Akamatsu through an interpreter (not the defendant) stated that someone had broken into the storeroom and got some chow out and they were to stay there until the barracks were searched. They found a bag with Rael's name on it full of corned beef,, cigarettes and chocolate bars. They beat Rael up until he told who else was involved. After they had Rael, Floyd and O'Connor lined up the defendant came into the camp. He saw the defendant hit O'Connor about three times and knock him into the cesspool. On cross-examination the witness testified that they had all been warned that there would be serious punishment for anyone who stole food. [Rep. Tr. 1543-5.] He did not mention the defendant in any statements he made to the Army. [Rep. Tr. 1557, 1573.]

HARDY M. WOOLDRIDGE testified [Rep. Tr. 2437] that the last part of July or first of August, 1945, a little after noon, the camp were ordered to fall out. Harvey, Tugby, Ichiba, Akamatsu and the defendant were down by the cesspool with Floyd and Rael. He saw them striking Rael and Floyd knocking them into the pool. Floyd and Rael were dismissed and O'Connor was called out of ranks. He was struck by the same men and knocked into the pool. Akamatsu struck him with a shoe heel. Somebody down by the pool said some Red Cross supplies had been stolen.

WILBURN VAN BUSKIRK testified [Rep. Tr. 2546] that the first part of July, 1945, just after the noon meal, he

saw Rael and Floyd down by the cesspool with Ichiba, Akamatsu, the defendant, McElheny, Harvey and Tugby and a couple of others. He saw these people strike Rael and Floyd, Akamatsu striking Floyd with his shoe. O'Connor was called out and Floyd and Rael were dismissed. He saw Ichiba, Akamatsu and the defendant strike O'Connor several times knocking him into the pool. On cross-examination [Rep. Tr. 2693] he testified that the defendant asked O'Connor if he had stolen anything from the warehouse and he said that he did.

DR. LEMOYNE C. BLEICH testified [Rep. Tr. 3388] that he did not witness anything that happened to Floyd and O'Connor.

MEIJI FUJISAWA testified [Rep. Tr. 3638] that in the summertime, he did not remember what year, he saw O'Connor get hit and knocked in the pond. He was acting as interpreter questioning Rael who admitted taking things from the storehouse. Ichiba and Akamatsu ordered Harvey and Tugby to make further investigation and O'Connor was brought out. He was hit by Ichiba and Akamatsu after which Ichiba ordered Harvey to carry on and O'Connor was shoved into the water at least a half dozen times by Harvey. He did not see the defendant there. [Rep. Tr. 3641.]

THE DEFENDANT testified [Rep. Tr. 4107] that he did not impose punishment on O'Connor or knock him into the pool. He was working at the factory as a clerk, and was not at the camp at the time.

OVERT ACT (g').* (David R. Carrier and George W. Simpson.)

DAVID R. CARRIER testified [Rep. Tr. 369] that he was in Montgomery's work detail the latter part of July, 1945. When they came in early the Japanese sergeant made them run around the compound. The defendant shouted at him to "hurry up" and "catch up." He testified he didn't catch up and "I made about four extra laps after the men quit." He could not identify the Japanese officer. [Rep. Tr. 400.] On cross-examination he testified that there was a Japanese standing near the defendant when he shouted at him.

GEORGE W. SIMPSON testified [Rep. Tr. 2246] that sometime in July, 1945, he was in Montgomery's detail which came into camp early. Ichiba told them they had come in early and to double time around the quadrangle. They had made about two laps when the defendant walked out. The defendant told him to catch up with the rest of the men and threw some clods.

*The time, place and date of this occurrence varies from May to July and the testimony is that the men all came in from work early. It must again be remembered that Kawakita, according to the records in evidence, as well as all the other testimony, was at that time working as a clerk in the factory—the quitting time being five o'clock at the factory. Hence, he did not and could not have come in early.

This overt act, likewise, should not arise to the dignity of "treason." It has for a long time been recognized as simple punishment in military circles for a violation of a slight infraction of the rules. The evidence as to this overt act is likewise very uncertain and indefinite. No two witnesses fixed the occurrence at the same specific day, as of the same specific time. Some fixed the occurrence with the intent to injure the United States—to strengthen Japan in the war or weaken the United States in the war. The order of the punishment was by Ichiba, the military officer. Ichiba sometimes played pranks on the men.

RALPH W. MONTGOMERY testified [Rep. Tr. 175] that he was in charge of a work detail of 20 men. At the beginning of the afternoon session a work quota was set which was completed a half hour before usual quitting time. Ichiba was angry because the detail came in early and ordered the men to double-time around the compound. While the men were running the defendant arrived at the scene. Simpson and Carrier were not able to keep up with the rest of the men. The defendant shouted to them to keep up with the rest of the men.

JOHN J. ARMELLINO testified [Rep. Tr. 1214] that the last end of May or early part of June, 1945, when he came in from the factory he saw Carrier and Simpson running around the quadrangle. The defendant yelled at Simpson, who was behind Carrier, and threw either rocks or clods of earth at him. Ichiba and Akamatsu were also there.

MAURY RICH testified [Rep. Tr. 1342] that in July he was in Montgomery's detail. They came in early and Ichiba made them run around the compound. While they were running the defendant came in with another detail. He came over and told the men to run faster and threw pebbles or rocks at Carrier and Simpson. The rest of the men were dismissed but Carrier and Simpson kept on running. He did not know who gave the order to stop running.

HOWARD L. POPE testified [Rep. Tr. 1476] that in early summer or late spring, probably July, 1945, when he returned from the factory detail and came into camp he saw a group of men running around the quadrangle. He went to his barracks and a few minutes later saw Simpson and Carrier still running and the defendant was standing

at a corner of the building tossing rocks at them. He did not know who stopped them from running.

JAMES T. PHILLIPS testified [Rep. Tr. 1532] that in June, July or August, 1945, close to 3:30 in the afternoon, he looked out the door of the barracks and saw 15 or 20 men running around the quadrangle. He walked up to the front of the camp and saw the defendant pick up two rocks and throw at Carrier and Simpson and holler for them to run faster.

JOHNIE E. CARTER testified [Rep. Tr. 1843] that sometime around July, 1945, at around 4:30 in the afternoon he saw a group of men running around the quadrangle. He heard the defendant tell Carrier and Simpson to run faster; that they had 3 or 4 more laps to make and "he picked up a few gravel or rock and threw it at Carrier and Simpson."

ROBERT WILLIAM GAYLER testified [Rep. Tr. 2344] that about two months before liberation, between 3:00 and 5:00 in the evening, he saw a detail come in the gates and have a conversation with a Japanese, not the defendant who was not there [Rep. Tr. 2349], after which the men began running around the compound. The defendant came in after the men were running around the compound and said that Carrier and Simpson were not running fast enough and made them run an additional five or six laps.

HARDY M. WOOLDRIDGE testified [Rep. Tr. 2444] that around the latter part of July, 1945, he was in Montgomery's detail and came into camp early. Akamatsu told them they had come in too early and to double time around the compound. After eight or ten times around the compound Akamatsu excused all of the men but Carrier and

Simpson. After he had stopped running he saw the defendant throw a rock or clod or something at Simpson and heard him tell Simpson to hurry up, go a little faster. On cross-examination he testified [Rep. Tr. 2514] that he had seen the same kind of punishment meted out from 15 to 30 times, "just practically once or twice a week."

THE DEFENDANT testified [Rep. Tr. 4110] that he did not come in early with a working party in July or August, 1945. He had nothing to do with compelling Carrier and Simpson to run around the compound. He was working at the factory as a clerk, his quitting time being 5 o'clock in the afternoon, and it being about ten minutes thereafter for him to leave. He at that time was living at the home of Kyoshi Movi and had to catch a special train to get there. [R. 3782.]

OVERT ACT (i).* (Johnie T. Carter.)

JOHNIE T. CARTER testified [Rep. Tr. 1847] that the defendant took some men out to get some logs. He was

*As there were strict orders to keep the men physically fit for work, and the principal objective of the Japanese was to keep the prisoners working, it is very unlikely that Kawakita would have denied any medical attention to the prisoners. Kyoshi Movi testified [R. 3792] that he carried a prisoner of war on his back to the mine hospital, which was a short distance away, and that it was necessary to maintain a hospital at that point. Furthermore, there were two American orderlies, prisoners of war, who were medical aids men and came there and got Carter.

It is regarded as bad medical technique to move a person who has been injured in a fall, unless it is done by someone experienced in handling injured persons. There are no two witnesses who place the time—varying from November to December. Furthermore, there is no evidence that this event, if it occurred, was done for the purpose of aiding Japan to win the war or the United States to lose the war. On the contrary, it would have the opposite effect, if the working man was disabled and could not be required to return earlier. This charge as a charge of "treason" seems to be stretching treason to unusual limits.

carrying a log, it was raining and sleeting and he felt a push and fell and landed on a rail. Then he remembered nothing until he was in the mess hall. He heard Gage ask the defendant for permission to take him into camp and the refusal.

PAUL L. SARNO testified [Rep. Tr. 660] that the first week in December, 1944, he was working at the mines as a medical orderly. He received a report that someone was hurt downstairs. He went down and found Sgt. Gage with Carter. They both thought it was a back injury and put him on a litter and carried him into the mess hall. This was about 2:00 in the afternoon. Sgt. Gage asked the defendant if Carter could be taken back into camp and was answered "no." Sgt. Gage then asked if he could be taken to the Japanese clinic for X-rays which was also refused. Carter was taken into camp with the rest of the detail and had to ride in an open car on the train which did not arrive at the camp until about 6:00 o'clock.

WILLIAM GAGE, JR., testified [Rep. Tr. 901] that about the last week in November, 1944, about 1:30 in the afternoon he received a call that a man was injured. He was a medical aidman and went down and found Carter. He examined Carter and placed him on a litter and took him into the mess hall. The defendant was there and witness asked him if he could take Carter into camp for medical attention which was denied. He then asked the defendant for permission to take Carter to the Japanese clinic for X-rays which was also refused. On cross-examination the witness stated that he did not report the injury to the Japanese foreman or military personnel. [Rep. Tr. 921.]

THE DEFENDANT testified [Rep. Tr. 4111] that he did not see Carter slip or fall or receive an injury. If he had known he was injured he would have taken him to the mine hospital; he would have asked permission from the foreman to take the man to the hospital. He did not delay his removal from the mine to the camp. He had taken prisoners of war to the mine hospital. [Rep. Tr. 4080.] On one occasion in November his attention was called to an injured man and after getting permission from Mr. Tamura he carried the man to the hospital on his back.

OVERT ACT (j).* (Armellino Paint Bucket Act.)

JOHN J. ARMELLINO testified [Rep. Tr. 1218] that he was in the can carrying detail, carrying one can. The defendant stopped him and asked him why he wasn't carrying two cans. Armellino replied that he was too weak whereupon the defendant told him he would carry two cans and like it. He then took a can from another man and placed it in the witness' arms and struck him. On cross-examination [Rep. Tr. 1234] the witness testified that he did not carry the cans much longer; that the defendant placed him on another detail.

ALBERT M. ENNIS testified [Rep. Tr. 594] that the last part of May, 1945, he was carrying paint or white lead and that the defendant stopped one of the group,

*How the Government can dignify this overt act as an overt act of treason we are having difficulty to find. This is comparable to making "spitting in a man's face" treason, as discussed in *Stephan v. United States*. No other witness corroborated Armellino and the time, place and date is likewise uncertain and indefinite. In the words of Patrick Henry:

"If this is Treason, make the most of it."

Armellino, and asked him why he wasn't carrying two buckets like the rest of the men. Armellino told him he was too weak and unable to carry two. The defendant stopped the next man and took one of his buckets and gave it to Armellino and told him to carry it too; then stood back and hit Armellino; and pushed him along with the two buckets.

THE DEFENDANT testified [Rep. Tr. 4112] that he did not order Armellino to carry two buckets instead of one. At that time he was working in the factory office as a clerk. The interpreter at the factory was a man named Inouye.

OVERT ACT (k).* (Woodrow T. Shaffer.)

WOODROW T. SHAFFER testified [Rep. Tr. 2057] that in the early part of August, 1945, about four o'clock in the

*This overt act was also an overt act of punishment. The times and dates were likewise uncertain and indefinite. The time also was at a time when the defendant was working as a clerk in the storehouse, from 7:30 in the morning until 5:00 o'clock in the afternoon.

The dates are uncertain as follows:

Shaffer said it was the early part of August, 1945, about 4:00 o'clock in the afternoon;

Rael said it was the summer of 1945;

Maury Rich, July, 1945;

Phillips, after May and before the end of the war, about 4:30 or 5 o'clock;

Another one, June, 1945;

Oldridge in July or first part of August, 1945, and

Van Buskirk the last part of July or first part of August, between 4:00 and 6:00 o'clock.

It must be remembered that these men were staying at the Hotel Northern in the City of Los Angeles and testified they had talked things over.

The act of punishment was within the internal affairs of Japan and certainly did not make Japan stronger in winning the war, or the United States weaker.

afternoon a Japanese guard caught a man cooking some beans that had not been issued in the general mess. Tugby and American Chief Petty Officer McElhaney got him and took him to the Japanese front office. The defendant, Ichiba, Akamatsu and several Japanese guards were there. Shaffer admitted stealing the beans. The defendant told him to get up on the little stand. The defendant and Akamatsu placed one piece of bamboo under his knees and another under the high part of his instep and made him kneel on them. Another piece was placed behind his knees and he was made to squat on them. The defendant placed a bucket of water in his hands and told him to hold that above his head without bending his elbows. Shaffer's elbows started to bend and the defendant and Akamatsu struck him with sticks. The defendant and the Japanese guards kept the bucket filled. A detail from the factory came in and after they were dismissed the Japanese guard brought a log over and the defendant told him to hold that up that he couldn't spill that. He fell off the platform and something hit him on the back of the head.

GID H. SPURLOCK testified [Rep. Tr. 1096] that around May, 1945, when he came into camp from working at the factory he saw Shaffer upon a platform squatting with a bamboo stick beneath his legs holding a bucket of water over his head. When some water spilled he saw the defendant and other Japanese fill the bucket. He didn't know why Shaffer was up there. [Rep. Tr. 1144.]

GEORGE W. MAYO testified [Rep. Tr. 1162] that in the summer of 1945 he saw Shaffer on a platform kneeling with bamboo under and behind his knees with a bucket of water over his head. He saw the defendant poke Shaffer in the chest once or twice and strike him with his cane.

MAURY RICH testified [Rep. Tr. 1346] that in July, 1945, when he came in from working at the factory he saw Shaffer on the high stand kneeling on a piece of lumber with a bucket of water over his head. After the men were dismissed the defendant and another Japanese sentry went over to Shaffer and every time he lowered the bucket of water they hit him over the back with some timber. He did not know why Shaffer was on the platform. [Rep. Tr. 1394.] The defendant came in with the detail. [Rep. Tr. 1346.]

JAMES T. PHILLIPS testified [Rep. Tr. 1535] that sometime after May and before the end of the war, 1945, about 4:30 or 5:00 in the evening he saw Shaffer sitting up on the rack with a bamboo pole under his knees and behind his knees under his ankles with a bucket of water over his head. He saw the defendant, Ichiba, Akamatsu, Hasha, Trosta, Harvey, Tugby and McElheny around Shaffer. When water spilled out of the bucket it was refilled by the defendant and Ichiba. He saw the defendant hit Shaffer in the ribs and poke him with his stick. After a time Shaffer dropped the bucket and witness saw the defendant and another Japanese put a log over his head and make him hold that. Right after that Shaffer collapsed and the log fell on top of him. On cross-examination [Rep. Tr. 1542] the witness testified that he knew Shaffer was being punished for stealing beans which was considered a serious infraction of the rules.

DAVID D. HUDDLE testified [Rep. Tr. 1720] that in June, 1945, he saw the defendant, Ichiba, and Akamatsu with Shaffer. They made him climb up on a platform. The defendant placed a bamboo stick on the platform and made Shaffer kneel down on it and then placed another

bamboo stick behind his knees which made him set down on two sticks. The defendant gave Shaffer a bucket of water and made him hold it over his head at arm's length. If Shaffer lowered the bucket the defendant and another Japanese guard would strike Shaffer with their swords and kept the bucket full of water. Later the defendant ordered a piece of timber placed in Shaffer's hands and made him hold that over his head. Then Shaffer fell off the platform head first and the log struck him on the back of the head. After he was fixed up the defendant placed sticks on the ground again and made Shaffer kneel down on them in the same fashion as he had before. They had been warned of severe punishment for stealing. Shaffer was being punished for stealing from the Japanese warehouse. [Rep. Tr. 1752.]

HARDY M. WOOLDRIDGE testified [Rep. Tr. 2459] that in July or first of August, 1945, between five and six in the afternoon, he came into camp with a detail and saw Shaffer kneeling on the ground by the stand. The defendant, Akamatsu and a few more were present. He saw Japanese officers strike their own Japanese personnel. [Rep. Tr. 2469.] He did not mention the defendant in a statement he gave regarding mistreatment. [Rep. Tr. 2478.]

WILBURN VAN BUSKIRK testified [Rep. Tr. 2550] that the last part of July or first part of August, 1945, between 4:00 and 6:00 in the afternoon he saw Shaffer with the defendant, Ichiba and Akamatsu and another guard by the Japanese headquarters. Shaffer was told to get on the stand; the defendant and Akamatsu fixed bamboo poles on the stand; Shaffer kneeled on them and another was placed behind his instep. They took another pole and

placed it between his knees and made him sit back on his heels. Then a Japanese guard brought a bucket of water which the defendant gave to Shaffer and told him to hold it over his head. If his arms bent he was beat over the back and poked in the ribs with sticks by Akamatsu and Kawakita. When the water spilled the bucket was replenished by the defendant. Then a Japanese guard brought a piece of wood which the defendant gave to Shaffer and told him to "Hold that on your head and see if you can spill that." Shaffer fell from the stand and the log struck him on the back of the head. Some time later he saw Shaffer being led back by the defendant. The defendant and Akamatsu placed some bamboo poles on the ground and placed Shaffer in the same position as before. The defendant told him in English to stand on the platform. [Rep. Tr. 2705.] Akamatsu and a guard were there alongside of the defendant.

DR. LEMOYNE C. BLEICH testified [Rep. Tr. 3389] that there were no permanent effects from the treatment Shaffer had received. There was an abrasion or slight laceration on his scalp, which healed in 5 or 6 days.

MEIJI FUJISAWA testified [Rep. Tr. 3675] that he saw the punishment of Shaffer for breaking into the store house. He did not see the defendant there.

THE DEFENDANT testified [Rep. Tr. 4113] that he did not participate in or assist the military personnel in executing punishment upon Shaffer. He was not present when such a thing occurred. At that time he was working at the warehouse office as a clerk, his working hours being from 7:30 to 5 p. m.

P.

Pertinent Testimony of Tomoya Kawakita Regarding
the Overt Acts.

The defendant testified that he lived at the home of Kiyoshi Mori and went in a train to the mine [R. 4101 to 4116]:

“Q. And during this period of time, from November until March, is it now your statement that at no time did you go down to the camp or camp area during that period of time? A. I never went to the camp area between that time.

Q. Now, after you went to work at the factory did you have occasion—what time did you go to work at the factory? What hours did you go to work? A. We went to work—we had to press our time card by 7:10 in the morning and we would finish work and press our time card at 5:10 in the evening.

Q. And during that time were you constantly at the factory grounds? A. Yes, sir.

Q. And in the warehouse where you were assigned as a clerk? A. Yes, sir; I was at the warehouse office and the warehouses.

Q. Sometime during that period of time did you have occasion to go down to the camp after March 1st, 1945? A. Yes, sir; but when I went to the camp—

Q. You have answered my question. And about how frequently would you go to the camp? A. About once or twice a month.

Q. What were the occasions of your going to the camp once or twice a month? A. Before the work was over I would have a call from Lieutenant Hazama and on several occasions from the sergeant who was the ser-

geant for the General Affairs at the camp, to come and help Mr. Fujisawa in doing his translations after the work is done, my work at the factory is done. So, I would—when I leave work I press my time card at 5:10 and I would go back to the dormitory and take a bath, eat, and then by the time I do all that thing it was about seven o'clock when I went to the camp and helped Mr. Fujisawa do some translation work until about nine o'clock that evening.

Q. And you say that would happen once or twice a month? A. Yes; some months maybe once.

Q. In the morning when you arrived at the factory what would be the routine that would happen after your arrival there? A. After we press our time card at about seven-ten, at 7:15 all the employees of the factory assembled on the grounds, in the factory grounds, to report, and each section of the company there would report, and there would be a roll call and we would have a morning ceremony which would last about 30 to 45 minutes.

Q. You say a morning ceremony. Was it something in the nature of a military ceremony? A. Yes, sir.

Q. And who would conduct this ceremony? A. At the factory the branch manager—Mr.—the manager of the factory.

Q. When you went into the camp were you required to salute anybody? A. Yes, sir.

Q. Who were you required to salute? A. We were to salute the guards at the guardhouse, which was situated at the main entrance of the gate to the camp and all the camp officials. There was a strict order from Lieutenant Hazama.

Q. When did you first meet Sergeant Ichiba? A. I met Sergeant Ichiba when I returned from China in Octo-

ber 1944, when I reported on my return to the branch manager and he told me to report to Lieutenant Hazama that I came back from China and I had a conversation with Lieutenant Hazama and he introduced me to Sergeant Ichiba.

Q. And did you afterwards have a conversation with Sergeant Ichiba? A. Yes, sir.

Q. And where was that conversation? A. The conversation was in the jimisha in the camp where the camp administration office was.

Q. What did Sergeant Ichiba say to you and what did you say to him?

Mr. Carter: Just a minute. I object to that upon the ground there is no foundation laid. Let us have the time and the conversation.

Mr. Lavine: I think he testified it was right after he came back from China, right after he reported.

Q. By Mr. Lavine: Do you remember what month it was? A. It was in the latter part of October 1944.

Q. Do you remember the day of the week any closer than that? A. I don't know that. It was the afternoon—it was after the noon meal when I went to the camp.

Q. And who else was present? A. There was one company employee over there in the office, and Akamatsu was there—Sergeant Akamatsu.

Q. And Sergeant Ichiba? A. Yes, sir.

Q. What did Ichiba say to you and what did you say to him? A. Ichiba told me that I must obey all military orders from all military personnel and he told me that the personnel of the camp were veterans in this war and 'If you disobey any orders you might get killed.'

Q. And what did you say in reply to that? A. I told him that I understood what he said.

Q. Thereafter did you see Sergeant Ichiba from time to time in the mine? A. Yes, sir.

Q. How frequently would he come up to the mine? A. He would come about every other week,—every other week. One week Sergeant Ichiba would come and the other week Sergeant Akamatsu would come, and inspect the work area, the mine where the prisoners of war were working.

Q. And did they take a count of the amount of work that was done or do any inquiring about that? A. Yes, sir.

Q. Would Lieutenant Hazama come up at the same time or different times? A. Lieutenant Hazama come up at different times than the sergeants.

Q. Did you at any time ever direct the military personnel in how to run this camp or this man or this work area in the mine? A. No, sir. If I did so, they would kill me.

Q. Did you ever direct any of the workmen as a foreman in the mine? A. No, sir.

Q. Did you ever act as a foreman? A. No, sir.

Q. Did you ever take it upon yourself to act as a foreman in this mine? A. No, sir.

Q. You heard the testimony here of Philip Toland that in the month of June 1945 you kicked him. Did you ever kick Philip Toland at any time at Oeyama? A. No, sir.

Q. Did you ever hit him or shove him or do anything else to make him do more work? A. No, sir.

Q. Did you do anything like that in the month of May, 1945? A. No, sir.

Q. Just what work were you doing during the month of May, 1945? A. I was doing clerical work in the warehouse office at the factory.

Q. And were you doing any work at all near a road bed and track of a railroad used in the operation of a smelter? A. No, sir.

Q. During the latter part of April 1945 did you direct or participate in the punishment of one J. G. Grant? A. No, sir.

Q. Did you have anything to do with knocking him into a drain or cess pool? A. No, sir.

Q. Did you strike him or beat him or hit him in any manner, shape or form? A. No, sir.

Q. What were you doing during the month of April, 1945? A. I was working as a clerk at the warehouse office at the factory.

Q. During the month of December 1944 did you at any time line up about 30 members of the prisoners of war who had been members of the armed forces of the United States for making mittens and the linings from pieces of blankets and cause them to strike and beat each other? A. No, sir.

Q. What were you doing during—this was at the camp. What were you doing during December 1944? A. In the month of December 1944 I was at the mine.

Q. And during the month of August 1945 did you impose any punishment on Thomas J. O'Connor for breach of camp rules by assaulting, striking or beating Thomas J. O'Connor? A. No, sir.

Q. Or did you do anything to knock him into a drain or cess pool of the camp? A. No, sir.

Q. What work were you doing during August, 1945?
A. I was still working at the factory warehouse office as a clerk.

Q. And until what date in 1945 were you working there? A. Until the 16 or 17 of August, 1945.

Q. And during the time were you punching a time clock at the warehouse factory? A. Yes, sir.

Q. Quitting time at 5:10 in the afternoon? A. Yes, sir.

* * * * *

Q. In July or August of 1945, during the afternoon, did you come back with any working party prior to 5:10 in the afternoon? A. No, sir.

Q. Did you during that month compel or have anything to do with compelling David R. Carrier and George Simpson to run around the compound at all* A. No, sir.

Q. Did you compel them to run faster or do four or six more laps around the compound? A. No, sir.

Q. What work were you doing the July or August of 1945? A. I was doing clerical work in the warehouse office and factory.

* * * * *

Q. On or about December 17, 1944 did you order and compel Johnie T. Carter to carry a heavy log up an icy slope? A. No, sir.

Q. Did you ever see Johnie T. Carter injured or hurt on any such log-carrying detail? A. No, sir.

Q. Did you see Johnie T. Carter slip or fall or receive any spinal injury? A. No, sir.

*It will be noted that the punishment of running around the compound was for coming back too early from their work detail. The testimony is that it happened about 4 o'clock.

Q. If you had, what would you have done? A. I would have taken him to the *mine* hospital.*

Q. Were there orders from your superiors, themselves, to do that? A. I would ask the foreman for permission to take the prisoner of war to the mine hospital.

Q. Were there general orders as to men injured to be taken to the mine hospital? A. Yes, sir.

Q. And just what were those orders? A. When prisoners of war are injured, they should be taken to the mine hospital for treatment of any kind.

Q. Did you at any time delay the removal of Johnie T. Carter from the mine to the camp? A. No, sir.

Q. Did you in May, 1945 order John J. Armellino to carry two heavy buckets of white lead instead of one bucket of lead? A. No, sir.

Q. Did you have any authority to do that? A. No, sir.

Q. Where were you working in *May* of 1945? A. I was working in the factory office as a clerk.

* * * * *

Q. Did you then and there strike and beat John J. Armellino in order to compel him to perform this work? A. No, sir.

Q. Did you have any authority to strike or beat him to do any work? A. I did not.

Q. Did you have any order to compel him to do that work? A. No, sir.

Q. In the late spring or early summer of 1945, within the confines of Camp Oeyama did you participate in or

*Kyoshi Mori testified that there was a mine hospital with four Japanese doctors close to the mine.

assist the military personnel of the camp in directing and executing any punishment upon Woodrow T. Shaffer? A. No, sir.

Q. Did you at any time tell Woodrow T. Shaffer that he should kneel or be placed upon a platform or be otherwise punished? A. I did not have any authority to say so.

Q. Well, did you say that? A. No, sir.

Q. Were you present when such a thing occurred? A. No, sir.

Q. Where were you working during the late spring or early summer of 1945? A. I was working at the warehouse office as a clerk.

* * * * *

Q. Where were you working in October of 1944? A. I was working at the mine at that time.

* * * * *

Q. Did you at any time while you were working in Oeyama ever have any intent to betray the United States?

A. No, sir.

Q. Did you at any time while you were working in Oeyama have any intent to give aid and comfort to the Japanese government? A. No, sir.

Q. Did you at any time while you were working in Oeyama do this work with any intent to help the United States lose the war and help Japan win the war? A. No, sir.

Q. Did you at any time do anything there to compel any members of the American armed forces to become abjectly subservient? A. No, sir.

Q. Did you at any time do anything to attempt to destroy the morale and the physical and mental well-being

of the members of the armed forces of the United States?

A. No, sir.

Q. When you came to Oeyama after your return from China did you at any time do any work in classifying or helping to classify any of the prisoners of war by identification? A. No, sir.

Q. As far as you knew, were the prisoners already all classified and entered? A. So far as I know, I think they were. . . .

* * * * *

Q. Did you ever have a conversation with Sgt. Carrier in which you said in substance and effect—in which you discussed General MacArthur? A. No, sir. There was orders at the camp not to talk anything about the war, politics or anything, or about ourselves.”

Q.

Meiji Fujisawa, the government’s witness and interpreter, testified as follows:

“Q. Did you during any time that you were in Oeyama from August 8th, 1944 until August 25th, 1945, hear from any source whatsoever that Tomoya Kawakita had struck, beaten or in any way assaulted J. C. Grant?

The Witness: No, sir.

Q. By Mr. Lavine: Did you at any time while you were at Camp Oeyama, from August 8th, 1944 until August 24th, 1945, hear from any source whatsoever that the defendant had kicked or struck Philip D. Toland? A. No, sir.

Q. Did you at any time from *August 8th, 1944 until August 24th, 1945*, while you were at Camp Oeyama, hear from any source whatsoever that the defendant had lined

up or struck any of 30 members of the armed forces of the United States for cutting up blankets? A. No, sir.

Q. Did you at any time while you were at Oeyama, between August 8th, 1944 and August 24th, 1945, hear from any source whatsoever that the defendant struck one Marcus A. Rael? A. No, sir.

Q. Did you hear from any source whatsoever while you were at Oeyama between August 8th, 1944 and August 24th, 1945, that the defendant had compelled one David Carrier or George R. Simpson to run around a quadrangle at the camp? A. No, sir.

Q. Did you hear from any source whatsoever between August 8th, 1944 and August 24th, 1945, that the defendant had compelled and commanded one John J. Armellino to carry two heavy buckets of white lead 500 feet and did strike and beat John J. Armellino? A. No, sir.

Q. Did you hear from any source whatsoever that Tomoya Kawakita, from August 8th, 1944 to August 24th, 1945, did assist the Japanese military personnel in directing or executing any punishment on Woodrow T. Shaffer? A. No, sir.

Q. What was your job in reference to interpreting any notes or any letters between any prisoner of war and the camp commandant? A. If any complaints or any requests were brought in by the prisoners of war they were translated by me.

Q. And was there ever at any time while you were at Camp Oeyama any complaints brought in to you to translate to the camp commandant regarding Tomoya Kawakita? A. No, sir.

Q. Were there rules and regulations posted in the camp regarding the conduct of prisoners of war? A. Yes, sir.

Q. Where were those rules and regulations posted?

A. They were posted in each hut and also from time to time they were posted on the bulletin board.

Q. And what did those regulations say as near as you can remember? A. Sanitation regulations—do you want me to enumerate some of the rules and regulations?

Q. Yes, enumerate all that you recall, Mr. Fujisawa.

A. Concerning sanitation, no man was to drink unboiled water, and no man was to eat raw vegetables. All men should at least wash their clothing once a week and after using the latrine they should wash their hands and use a disinfectant that was provided outside the latrine. That is all I can think of of sanitation right now. And then no man was to smoke in bed and if they are going to smoke they have to sit on the bench and smoke. No man is to have any matches—any knives. And no pilfering to be done.

Q. Was that no pilfering to be done? A. Pilfering, yes.

Q. And by pilfering you mean stealing? A. Yes, sir. Well, the hours, reveille hours and tap; well, the day's hours were posted, the time they get up in the morning, have their breakfast, the time they go out to work and the time they come back to the camp from work, and the time that they had their supper. That is all I can recall right now.

Q. What did it say about punishment for violation of the rules, if anything? A. Yes, sir.

Q. Were punishments announced on this blackboard? A. Yes, sir.

Q. Did you have occasion to see the punishment of Woodrow Shaffer? A. Yes, sir.

Q. Did you know what Woodrow Shaffer was being punished for? A. I think he was punished for breaking into the store house." [R. 3670-3676.]

Sgt. Montgomery testified:

"Q. And as a sergeant were you quartered in a different place than the other men who were privates? A. No, sir. I was at that time assigned to barracks No. 2 as the barracks leader.

* * * * *

A. Later they were—well, when we first arrived in the camp there were—let's see; I think there was one British sergeant who had separate quarters.

Q. What was his name? A. Sergeant John Harvey.

* * * * *

Q. Did you know another sergeant named Sergeant Dean? A. That is Warrant Officer Dean.

Q. Warrant Officer Dean. Did you know another sergeant named McElheny, or was he a petty officer? A. I knew a chief yeoman in the United States Navy by the name of McElheny.

* * * * *

Q. Did you know Tugby? A. I knew a warrant officer Tugby of the Canadian Army.

Q. That was the same as the British warrant officer? He is the same as our master sergeant, is that correct? A. Yes, sir.

Q. Did you associate with these four men whom I have named? A. From time to time I did; yes, sir.

Q. And did you have anything to do with the discipline of the men in the camp? A. Yes; I did.

Q. Did you sit with any of these four people I have named to pass on punishments for men who had violated some camp regulation? A. Now, if we are going into that, this should be discussed.

* * * * *

A. I never sat with them, no; I discussed it with them many times.

The Court: By 'them' whom do you mean? A. Major Beadnell, Captain Bleich, Lt. Bryant, Warrant Officer Dean, Warrant Officer Purcell, the man I knew as Warrant Officer Rogers. Later on I understand he was a sergeant. A Canadian Warrant Officer by the name of Tugby.

Q. By Mr. Lavine: When you say you discussed with them, you discussed the various violations of the men in the camp with them from time to time and what punishment should be meted out? A. That was to prevent the severe punishment of the Japanese.

Q. Would you listen to my question? * * *

* * * * *

Q. By Mr. Lavine: And the punishment that was carried out was carried out by these men from time to time, was it not, these American, British, and Canadian petty officers, for violations in the camp; isn't that correct? A. Yes, sir." [R. 205-208.]

R.

The Following Is the Testimony of the Different Witnesses Which the Government Introduced to Show "Intent" to Betray. We Request the Court to Examine These Closely to See if Anything Can Be Found in Any of Them That Would Show Treasonable Intent.

Witness David R. Carrier:

"A. Well, sir, he asked me what I thought of General MacArthur and I told him I thought MacArthur was all right. He asked me if I didn't think it was pretty dirty of him for leaving us in the Philippine Islands and going to Australia. And I replied that he was our commander and had orders the same as we did and he had to obey them the same as we did. And Kawakita replied that he thought it dirty of him for leaving us like that and he wasn't no good.

Mr. Lavine: Just a minute. I move to strike all that answer. Certainly, I thought it was going to be a different line of conversation, and certainly that is irrelevant, incompetent and immaterial on the different grounds, your Honor. It does not show any relationship to the crime on trial.

The Court: Isn't it relevant to the issue of the intent?

Mr. Lavine: Not as to discussion regarding an American general. I do not see how that could be relevant to intent, your Honor.

The Court: Motion denied." [Rep. Tr. p. 365, lines 6-25.]

Witness Marcus Rael:

"A. Well, he was rushing us up, telling us to hurry—'Get the God damn unloaded,' and, well, he was just rushing us up all the time to get the car unloaded.

Q. How many men were in that detail, do you recall?

A. No, I don't

The Court: Is this an act charged in the indictment?

Mr. Lillie: No, your Honor.

The Court: I admonish the jury again with respect to any incidents alleged to have taken place involving the defendant, which are not charged in the indictment.

This evidence is received for the sole purpose of indicating the state of mind or the intent with which the defendant acted, if you find he did the acts charged in the indictment." [Rep. Tr. p. 600, lines 4-22.]

Witness Paul Sarno:

"The Witness: He says to me, he says, 'It looks like MacArthur took a run-out powder on you boys'!

Naturally in the position I was in at the time I didn't answer. A few seconds later he says—he says, 'The Japanese were a little superior to your American soldiers.'" [Rep. Tr. p. 648, lines 1-6.]

Witness Paul Sarno:

"Q. And you took their temperatures, is that correct?

A. Yes, sir.

Mr. Lavine: I object to this as incompetent, irrelevant and immaterial. * * *

We are not here trying him for war crimes.

The Court: * * *

The defendant here is charged with certain acts of treason. These acts are set forth in the indictment. Evi-

dence of any other occurrence is admitted here for the sole purpose not to prove the defendant did the acts charged in the indictment, but for the sole purpose of tending to show his state of mind in doing any acts which you find from the evidence he may have done, if any.

* * * * *

Q. By Mr. Lillie: At that time you had taken the temperatures of these prisoners, is that correct? A. Yes, sir.

* * * * *

Q. By Mr. Lillie: Now, at that time did you see the defendant? A. Yes, I had these men laying down on these benches that we used to eat our chow—sit down on, and Kawakita came in and said, 'What are all these fellows doing down here?'

I says, 'Well, they got permission from the Japanese hanches to come downstairs,' and I says, 'I took their temperatures and went up to the Japanese guards and I got permission to keep them down there to rest.' I says, 'They are all run down and they can't work.'

He says, 'What do you mean, they can't work?'

I says, 'They just can't work.'

He says, 'Well,' he says, 'we are not feeding these fellows out here,' he says, 'not to work.' He says, 'Tell the doctor when you go in we only want men out here that can work.'

So, I didn't say anything else. He says, 'Don't forget to tell the doctor,' he says, 'When you go in that we only want able-bodied men that can work.' He says, 'From now on, anybody that can't work won't get anything to eat—no rations,' and their rations were taken away from them if they didn't work a half day in the morning.' [Rep. Tr. p. 651, line 11, to p. 654, line 17.]

Witness Nathan Sutton:

"The Witness: Yes, sir; I do. We were working on the ore cars. The defendant came up. The hanchō was present. Then he turned around to us and said, 'Stop working on the ore cars. Start cleaning up this track.' I didn't hear no words going between the hanchō and the defendant—

Mr. Lavine: I move to strike the last part of the answer as a volunteer answer, your Honor.

Mr. Carter: He said what he heard.

The Court: Motion denied.

Q. By Mr. Carter: This hanchō you referred to was the Japanese hanchō? A. Yes, sir.

Q. Did the American prisoners of war then stop work on the ore cars? A. Yes, sir; we started picking up rock." [Rep. Tr. p. 724, line 17, to p. 725, line 6.]

"Q. What was said and one at that particular time?

Mr. Lavine: Objected to—

A. He told us—

Mr. Lavine: Just a minute. Objected to as irrelevant, incompetent, immaterial, not within the issues charged in the indictment.

The Court: Overruled. You may answer.

A. He told us that if we would raise our quota of loads, we would be getting more food; and if we raised our quota, we would be able to quit earlier. * * *"
[Rep. Tr. p. 726, line 21, to p. 727, line 4.]

Witness Frank E. Mine:

"Q. By Mr. Lillie: Do you recall a conversation you had after an air raid? A. Yes, I recall a conversation after an air raid. It was to the entire camp that was at

work at the time at the factory that this occurred one time. The approximate date was about a month before the end of hostilities. Mr. Kawakita himself stepped up and he made a statement that, 'We shot down all of your planes.' This was a bombardment of Miasi—a miasi bombardment by the Americans. He said 'We shot down all your planes. We have very good anti-aircraft. You Americans don't have no chance. We will win the war.'” [Rep. Tr. p. 791, lines 6-17.]

Witness Wm. Gage, Jr.

At a conversation in the rest han at the mine, only the defendant and witness present, in November 1944.

“Q. What did you say and what did the defendant say?

Mr. Lavine: Objected to as irrelevant, incompetent and immaterial, and not within the issues.

The Court: Overruled. You may answer.

A. Why, I asked Kawakita how long he thought the war would last.

Q. By Mr. Carter: What did he say? A. He answered '20 years and Japan will win it.'” [Rep. Tr. p. 881, line 19, to p. 882, line 1.]

And a later conversation the same month:

“Q. Who was present? A. I don't remember anybody being present except the defendant and myself.

Q. What was said by yourself and the defendant?

Mr. Lavine: The same objection, your Honor; incompetent, irrelevant and immaterial.

The Court: Objection overruled.

The Witness: I asked, when we were talking about things in general, and I was always trying to get some-

thing out of him where I could get a little uplift for morale purposes, and this particular morning the conversation got around to—I asked him what he was going to do and if he thought he would ever get back to the States. He said yes, he said he would come back to the States, and he said when he got back he would be a big shot because he knew the country, he knew the people and he knew the language.” [Rep. Tr. p. 882, line 16, to p. 883, line 6.]

Witness Morton Feinberg:

“A. Well, I didn’t have a conversation with him, but I was in a group of men that he addressed and the remark that he made was that we wouldn’t get out of that camp for 50 years and we didn’t think the Americans would win the war, did we?

Q. Was that all that was said at that time? A. That is about all * * *

Mr. Lavine: And may I interpose the basic objection because I didn’t want to interrupt the witness. It is incompetent, irrelevant and immaterial.

The Court: Yes, you may, and the objection is overruled.” [Rep. Tr. p. 962, line 13, to p. 963, line 3.]

On an occasion at the mine:

“A. There was a group of men—about 20 men.

Q. On that occasion did the defendant have anything to say? A. Yes. He would come along and say, ‘Come on, you guys are not working fast enough. Let us put out a little work here.’ ” [Rep. Tr. p. 964, lines 4-9.]

And at the factory:

“A. Why, yes. His statements usually ran the same as up at the mine. ‘Come on, hurry up. Let’s put out more work.’ ” [Rep. Tr. p. 965, lines 2-4.]

Witness Gid Spurlock. On an occasion at the factory:

“Q. The defendant was there and you were there?

A. Yes, sir.

Q. What did he say to you?

Mr. Lavine: Objected to as incompetent, irrelevant and immaterial and not within the issues in this case.

The Court: Objection overruled.

Q. By Mr. Carter: What did he say?

* * * * *

A. Well, he said, ‘Get up and get to work.’

Q. Anything else? A. No, that is about all.” [Rep. Tr. p. 1079, line 19, to p. 1080, line 11.]

Witness George Mayo. On occasions both at the mine and factory:

“Q. Do you recall whether or not the defendant ever made any statements to you? A. To me? Well, at the factory—I mean at the mine he has come around and said, ‘Get going. Get to work,’ such statements as that.

Q. Well, how frequently would he make those statements? A. Well, any time he came around where we was working.” [Rep. Tr. p. 1158, lines 12-18.]

“Q. Did you ever see the defendant in any of the rest shacks? A. Yes, sir. We would be taking a morning break or afternoon break, you are supposed to get—well, whatever time it was, 10 or 15 minutes. He would come in before the time was actually up and say, ‘You guys get going,’ and run us out of the rest shack. He would stay and warm a while, and come out and tell us we could work and keep warm.” [Rep. Tr. p. 1159, lines 3-10.]

On an occasion when they came in from the mine and were lined up for the count-off:

“Q. Who lined you up? A. Well, they always lined us up, the Japanese—Ichiba and Akamatsu and several of them, and they sometimes had a practice of checking our mess gear—kits. We carried our mess kits in for kindling wood and things were brought in, so this particular evening they found several pieces of kindling on several of us. I don’t know all of the guys. Well, in fact I don’t remember any of their names but one, I don’t think, and after all the rest of the men was dismissed Kawakita told us to line up by the jimisha, the office, and made us take the kindling out of our mess kits and hold it in our hand and he came by and said, ‘Don’t you know you are not allowed to have this kindling?’ And asked what we were doing with it and we told him we brought it in to build a fire with, so he took it and said ‘Don’t you know it is against the camp rules and regulations?’ And he took it and struck us across the face with it and dismissed us.” [Rep. Tr. p. 1160, lines 7-24.]

On an occasion at the factory mess hall in July 1945:

“The Witness: Well, several prisoners sitting around. I don’t remember their names. Several of us sitting around outside the mess shack. We were talking about, naturally, when the war would be over and Kawakita walks up and hears the statement—he hears what we was talking about and he said, ‘Well, you guys needn’t be interested in when the war will be over because,’ he said, ‘You won’t go back; you will stay here and work.’ He says, ‘I will go back to the States because I am an American citizen.’” [Rep. Tr. p. 1166, lines 14-22.]

Witness John Armellino. In October 1944 at the mine:

“Q. By Mr. Lillie: When did you first see the defendant? A. We seen him coming over the hill, sir, and we were standing around, grouped up, and right away as he came over the top of the hill he just yelled out at us the following statement: He said, ‘Get to work, you sons of bitches.’ He said, ‘You are not here at a damn bingo game,’ and at that time he had a stick in his hand and he swung it. I managed to get out of the way. Then he yelled, ‘You are not here for your damn health.’ And at that time he caught somebody full across the back who was not quick enough to scamper out of his way. That was my introduction to Kawakita.” [Rep. Tr. p. 1211, lines 13-23.]

* * * * *

Witness Arthur Staninger.

In September 1944, at the mine; POWs and 2 or 3 guards present:

“Q. What did you hear Kawakita say at that time?

Mr. Lavine: Objected to as irrelevant, incompetent, immaterial, and not within the issues of this case.

The Court: Overruled.

Mr. Carter: You may answer the question.

A. Kawakita told us that we were prisoners of war, and he says, ‘I guess you fellows understand the circumstances. If you don’t work, why, you will suffer.’

Q. Was there any Japanese person standing by or near Kawakita at the time he made this statement? A. All I remember is one of the guards that was standing near.

Q. Did you see the Japanese guards at or about that time conversing with Kawakita? A. The guard didn’t say a word.

Q. Did you ever recall an incident involving Kawakita and a Japanese guard? A. Yes; I recall Kawakita slap a guard at the mine.

Mr. Lavine: Defendant objects to that as irrelevant, incompetent, immaterial, and move to strike the answer.

The Court: Sustained. The motion is granted. The jury is instructed to disregard it.

The preceding incident which the witness has related, ladies and gentlemen of the jury, is an incident, of course, not charged in the indictment, and received in evidence here for the sole limited purpose that I have explained to you heretofore with respect to incidents not alleged in the indictment—only for the purpose of enabling you to determine from surrounding circumstances and other acts, as well as evidence of the acts charged in the indictment, the intent or state of mind with which the defendant did the acts charged in the indictment, if you find after the close of all the evidence that he did those acts.” [Rep. Tr. p. 1277, line 4, to p. 1278, line 11.]

An incident at the camp:

“A. Well, when he got—

Mr. Lavine: I object to that as incompetent, irrelevant and immaterial, your Honor, the basic objection.

The Court: Objection overruled. You may answer.

The Witness: When he got in the guard searched all of them and they found this one onion on Toland.

Mr. Lavine: This is not an incident, as I understand, charged in the indictment.

Mr. Carter: It is not testimony directed to any overt act, if the court please.

Mr. Lavine: Object to it as incompetent, irrelevant and immaterial.

Mr. Carter: Offered for the purpose of generally showing the intent of the defendant.

The Court: Very well. It will be received for that limited purpose only. Proceed.

The Witness: This happened after work. Toland was working—

Q. By Mr. Carter: Will you speak a little louder?

The Witness: Toland was working at the camp, the factory. He came in and the guard searched him. They found this one onion on him, so Kawakita came up and sent all the rest of them in the barracks and made Toland run around the compound about eight or nine times.” [Rep. Tr. p. 1280, line 8, to p. 1281, line 5.]

“The Court: * * *

That incident also, ladies and gentlemen, which the witness just related about the onion is not one of the acts charged in the indictment and of course the evidence as to that is limited, as I previously explained to you, for the sole purpose of determining the state of mind or intent with which the defendant acted, if you find from the other evidence that he did act as charged in the indictment. I do not need to say to you that proof or evidence that the defendant did something with respect to an onion is not evidence he did something with respect to something else. Evidence that he may have done other acts than those acts charged in the indictment is not in any sense evidence that he did the acts charged in the indictment, so that evidence, again, I say, is placed before you for the sole purpose of enabling you to judge and determine the state of mind and intent with which the defendant acted, if you find from the other evidence that he did act as charged in the indictment.” [Rep. Tr. p. 1281, line 17, to p. 1282, line 9.]

Witness Maury Rich.

End of December 1944, at the sawmill in the factory, about 9 Canadians also present:

“Q. All right. Tell us what occurred and what the defendant said, if anything, at that time?

Mr. Lavine: I object to that as incompetent, irrelevant and immaterial; not within the issues of the case.

The Court: Objection overruled.

The Witness: We were eating our lunch out of our mess gear and sitting around on the ground. Kawakita came up and he looked into our mess gear and wanted to know what we were eating, and one of the boys spoke up and said—we told him it was American corned beef that we got in Red Cross packages, and he says, ‘You better make good use of that American garbage because you will never get to eat any more of it,’ and he kicked one fellow’s mess kit out of his hand, and he told us to get the hell out and go back to work before we got through eating.” [Rep. Tr. p. 1332, line 22, to p. 1333, line 11.]

And about a week later with same persons present:

“A. And he told us that the Americans were losing the war.

Mr. Lavine: I object to this as incompetent, irrelevant and immaterial.

The Witness: And that San Francisco was being bombed.

The Court: Just a minute.

Mr. Lavine: Object to it as incompetent, irrelevant and immaterial, and not within the issues of this case.

The Court: Overruled.

The Witness: And he says 'We will kill all you prisoners right here anyway, whether you win the war or lose it. You will never get to go back to the States.'

* * * * *

A. Well, one time we were bringing in logs which they used for boards, and this was in a cold month. I think it was around March of 1945, and we rolled down one log that was too heavy for four men to carry, and we were waiting for the other four men to come in, and at that time Kawakita came up and he says, 'What the hell is the matter with you sons of bitches? Here, get going here,' and we told him it was too heavy for four men to carry and at that time he stood me at attention and he whacked me across my left arm with a saber of some kind.

Mr. Lavine: Just a minute. I object to that as not within the indictment and not within the issues of this case, and move to strike the answer, your Honor.

The Court: The motion is denied. These incidents which the witness has testified to up to this point, I believe none of them are in the indictment, are they?

Mr. Carter: It is offered for the purpose of showing intent.

The Court: The evidence is offered, as I understand it, for the limited purpose and received for the limited purpose which has heretofore been explained to the jury.

* * * * *

The Court: It is not one of the overt acts, and neither are the statements which the witness has testified to up to this point.

Proof of statements or other acts of course, do not constitute evidence of the overt acts alleged in the indict-

ment as I said to you earlier today. This evidence is received for the sole and limited purpose of enabling you to determine, upon the close of the case, the intent or state of mind with which the defendant acted, if you find from all the evidence in the case that he did act, did the acts charged in the indictment or any of them." [Rep. Tr. p. 1334, line 4, to p. 1336, line 7.]

"Q. By Mr. Lillie: * * * Did you look at your wrist and your arm? A. They were bleeding severely and I asked to go for medical attention and he told me they couldn't waste any good medical aid on a bunch of lazy Americans.

Q. By the Court: Who told you that?

The Witness: Kawakita, sir." [Rep. Tr. p. 1336, lines 19 to 25.]

Witness Alexander Holik.

In October 1944 at the mine, with the hanchō and four others present, one of the men asked Kawakita his opinion of the war:

"A. He says we will never go back to our wives and families. He says the Japanese are going to win the war and he is going to be No. 1 man over here, and he was coming back to the United States." [Rep. Tr. p. 1400, lines 6 to 9.]

And at the factory while unloading cement:

"Q. Did you hear Kawakita say anything or observe him do anything at or about that time? A. Yes. He told me to hurry up; I was too slow. So he gave me a push and a bag of cement fell on my back." [Rep. Tr. p. 1402, lines 7 to 10.]

Witness Howard L. Cope:

In February 1945, at the factory, first saw D. Several Hanchos, two Britishers and Sgt. Gage present.

“Q. What was the conversation?”

Mr. Lavine: Objected to as irrelevant, incompetent, immaterial, and not within the issues of this case.

The Court: Overruled. You may answer.

A. Well, at that time I was working in the kitchen there. They had a small soup kitchen that they cooked soup for the prisoners for their noon meal. And I had walked into the section of the kitchen there or the rest hut where the Japanese guard and hanchos used for their paper work and where they sat around when the prisoners were in there. When I came out, why, someone asked me if I wasn't a damn Yank. I was more or less surprised. I hadn't heard anything English spoken in there. So I turned and said I was. And I saw this defendant. And he says, 'Where did you go to school?' And I told him I went to school at Eureka, North Carolina. He said, 'I never heard of the place.' At the time, he was wearing a heavy, dark sweater with a large yellow 'C' on it, an athletic letter. And I said, 'I see that you have been to school somewhere.' He says, 'You have got an athletic number.' I says, 'Where was it?' And I don't recall where he said, but I said 'Well, I don't think I have heard of that place, either.' I asked him if it was a Government sponsored institution in the States, and he slapped me, and he says, 'They never gave me a damn thing.'

Mr. Lavine: I move to strike the testimony, your honor, as irrelevant, incompetent and immaterial.

The Court: Motion denied. * * *” (Jury again admonished *re* incident not charged as overt act to be con-

sidered solely on question of state of mind or intent.) [Rep. Tr. p. 1374, line 12, to p. 1375, line 23.]

Witness James T. Phillips.

“Q. Do you recall another occasion in which there was some conversation between yourself and the defendant concerning the subject of food or chow? A. Well, this happened shortly—it was around March or May, sometime around there, and it was in the same barracks, same han. The defendant came in, Kawakita came in with either Akamatsu or the camp commandant, I can’t recall which.

Q. Anybody else besides the two of them come in? A. Just two of them, that is all.

Q. Who was present? A. Joe Edmunds, myself—oh, there were four or five British around there.

Q. And what time of the day did this occur? A. It happened at the noon meal.

Q. What did the defendant say, if anything? A. He said still the patients were getting too much rice.

Mr. Lavine: Just a minute. Pardon me. I object to that as incompetent, irrelevant and immaterial, and not within the acts charged in the indictment, and it is prejudicial to introduce this type of testimony without any foundation.

Mr. Carter: It is offered for the sole purpose of showing intent.

The Court: Objection overruled. The testimony will be received for the limited purpose of showing the intent or state of mind with which the defendant acted if you, the jury, find from all the evidence in the case he did act as charged in the indictment.” [Rep. Tr. p. 1502, line 9, to p. 1503, line 13.]

See page 1505, line 13 *et seq.* for agreement as to instruction when evidence received for limited purpose of intent.

“Q. By Mr. Carter: Sgt. Phillips, just before the adjournment I had asked you if you recalled a conversation or some statement made by the defendant concerning the general object of winning the war; and I think you had indicated that this occurred in the presence of certain people that you named at the camp hospital. A. That is right.

Q. Is that right? A. That is right.

Q. And approximately when did this conversation occur? A. Sometime in the spring of 1945.

Q. Will you relate what was said by the defendant and anyone else then present? A. I do—

Mr. Lavine: Wait just a minute. I object to that as irrelevant, incompetent, immaterial, and not within the issues of the case.

The Court: Overruled.

Mr. Carter: I stated previously that this was offered for the purpose of showing intent and state of mind on the part of the defendant, when we had the discussion between us here.

The Court: Very well; it will be received for the limited purpose of showing intent and state of mind.

Q. By Mr. Carter: Will you state what was said at that time? A. He said Japan would win the war if it took a hundred years; also, that the Japanese were far superior to the American people and if the American army had Japanese officers, why, they could whip the world.”
[Rep. Tr. p. 1509, line 13, to p. 1510, line 17.]

Witness Philip B. Toland.

In March 1945, in the factory area:

“Q. By Mr. Lillie: What was the statement?

Mr. Lavine: Object to that as incompetent, irrelevant and immaterial.

The Court: Is it offered for the limited purpose of showing the state of mind of the defendant?

Mr. Lillie: Intent, yes, sir.

The Court: Objection overruled. It is received for that limited purpose only. You may answer the question.

The Witness: Well, I was working—I was picking up sticks from around the area and I heard Kawakita mention the word ‘Hate’, so I picked up about two or three more sticks and I turned around and I heard him make the statement, ‘I wish you were all dead.’” [Rep. Tr. p. 1641, line 21, to p. 1642, line 8.]

Witness David Huddle.

In November, 1944, at the factory or the mine:

“Q. Did you ever have a conversation with him or were you ever present when Kawakita had something to say on the general subject of the amount of work? A. Yes; I was.

Q. Where? A. At the mine, at the levels where we were working.

Mr. Carter: This is offered, your Honor, on the general subject of intent and state of mind of the defendant.

Mr. Lavine: May the record show that I interpose an objection as irrelevant, incompetent, immaterial, not within the issues?

The Court: Objection is overruled. The testimony of any acts other than those charged in the indictment, if received, is received for the sole limited purpose of enabling the jury to determine the state of mind or the intent with which the defendant acted, if the jury should find from all of the evidence, upon the close of the case, that the defendant did act as charged in the indictment.

Q. And referring to this conversation on the general subject of the amount of work, who was present? A. The men on the detail I was working with.

Q. Was the defendant there? A. Yes, sir.

* * * * *

Q. What did you hear the defendant say? What was said at that time?

Mr. Lavine: To which I object as incompetent, irrelevant and immaterial, and not within the issues of the case.

The Court: Is this offered only on the issue of intent?

Mr. Carter: Yes.

The Court: Objection overruled, and it will be received for that limited purpose.

* * * * *

The Witness: I heard the defendant say for us to hurry up, 'Get out more loads,' and that we were killing time." [Rep. Tr. p. 1696, line 9, to p. 1699, line 4.]

And at about the same time:

"Q. By Mr. Carter: Just state, Sergeant, what the defendant said, if anything, on this day in question following the day that you had made your quota. A. The defendant said that we got our quota and had time to rest and that our quota would be raised more for the following day." [Rep. Tr. p. 1700, line 25, to p. 1701, line 5.]

And regarding the rest periods:

“Q. How much more of your rest period was there to go? A. About five minutes more.

Q. Will you state what transpired at that time, what you heard and what you saw?

Mr. Lavine: Object to that as incompetent, irrelevant and immaterial, and not within the issues of this case.

Mr. Carter: It is offered on the question of intent and state of mind of the defendant.

Mr. Lavine: There is no foundation to show that the defendant was responsible for anything that happened during the rest period.

The Court: Will the defendant be connected with this?

Mr. Carter: Yes.

The Court: The objection is overruled and the evidence will be received for the limited purpose of showing the state of mind and intent.

Q. By Mr. Carter: State what you saw and heard at that time? A. At that particular time Kawakita chased us back out of the rest hut to work before our rest period was up.

* * * * *

A. What I heard was, Kawakita said, ‘All right, men, back on the job.’” [Rep. Tr. p. 1702, line 13, to p. 1704, line 14.]

And in December of 1944 at the mine:

“Q. What did you hear the defendant say at that time and place? A. Well, at that time the defendant mentioned that we needn’t worry about the war or the ending of the war, because we would never get back to the United States.

Q. What else, if anything, did he say? A. Well, he made the remark that he was going back to the United States to be a big shot, because he knew the Japanese and the English language, both.

Q. Do you recall any—

Mr. Lavine: Wait a minute. I make the objection to that as incompetent, irrelevant, immaterial, not within the issues of the case.

The Court: The objection will be deemed made in advance of the answer given and overruled. I take it that evidence is offered—

Mr. Carter: Offered on the question of intent and state of mind of the defendant.

The Court: And is received for that limited purpose.” [Rep. Tr. p. 1705, line 23, to p. 1706, line 16.]

And in January 1945, at the mine, before 300 Americans and British POWs.

“Q. All right. Now describe what you saw and what you heard at that time A. Well, at that time Kawakita was standing up in front of the entire group. He told us that we hadn’t reached our quota in loads of ore and therefore our noonday soup would be taken away from us.

Q. Was it taken away? A. It was.” [Rep. Tr. p. 1707, lines 5 to 12.]

Regarding an incident involving the subject of chewing gum; at the factory, in April 1945:

“Q. What occurred on that particular occasion?

Mr. Lavine: Object to it as irrelevant, incompetent and immaterial, and not within the issues of this case. There is no incident of chewing gum here. I don’t know what the purpose of it is in this case, your Honor.

Mr. Carter: Offered on the general subject of the intent and state of mind of the defendant.

The Court: The objection is overruled. It will be received for that limited purpose.

Q. By Mr. Carter: State what happened at that time, Sergeant. A. At that time Kawakita stopped me and asked me if I was chewing gum, and I said—

Q. What did you say? A. I said I wasn't. Kawakita grabbed me by the shirt collar and told me to open my mouth. Well, I didn't have a chance to swallow the gum and I tried to conceal it under my tongue. And when I opened my mouth he saw the gum. He says, 'You lie,' and he drew back—he held me with his left hand by the shirt collar, and he drew back with his right and he hit me three times in the nose and just broke my nose.

Mr. Lavine: I move to strike the incident as having no relevancy to the crime of treason, your Honor.

The Court: The evidence is received for the limited purpose of showing the state of mind. It is on that issue and that issue alone. It doesn't tend to prove or disprove and is not offered or received as tending to prove or disprove any act alleged in the indictment." [Rep. Tr. p. 1714, line 4, to p. 1715, line 7.]

Witness John L. McCoy.

In October or November 1944, at the mine:

"Q. What did the defendant say, if anything, and what did you or whoever you heard him talking to have to say?

Mr. Lavine: Objected to as irrelevant, incompetent, immaterial, and not within the issues of the case.

Mr. Lillie: It goes to the state of mind.

The Court: Is it offered for that limited purpose of showing intent?

Mr. Lillie: Yes.

The Court: Objection is overruled and the evidence is received for the limited purpose on the issue of intent.

A. He asked me how I was getting along and I said, 'I was getting along.' He asked me how I would like to be in the Biltmore eating a nice big steak. I said 'Very much.' He told me at that time that the Japanese had driven the Americans out of the Pacific; they had shot down all the American planes and sunk the American ships; and that he soon would be coming to the United States, where he would be a big shot because he knew the language and the people and the country.

* * * * *

Q. Did he say anything further in the conversation?

A. Well, he told us that we were not putting out enough work at that time. Of course, that wasn't anything outstanding; he was telling us that all the time." [Rep. Tr. p. 1776, line 15, to p. 1777, line 17.]

In November, 1944 the question of quotas was being discussed:

"Q. What did the defendant say, if anything, sir?

Mr. Lavine: I object to that as irrelevant, incompetent and immaterial, what he said about the quota.

The Court: Overruled.

* * * * *

A. He said the quotas were too low; that they should be raised; that we should turn out more work." [Rep. Tr. p. 1779, line 8, to p. 1780, line 4.]

Witness Johnnie E. Carter.

In October or November of 1944 at the rest shack:

“Q. Will you relate the circumstances in respect to the conversation and the conversation?”

Mr. Lavine: Objected to as irrelevant, incompetent, immaterial, the basic objection, your Honor.

Mr. Lillie: State of mind.

The Court: Overruled.

* * * * *

A. The conversation started out—he asked me where—Kawakita asked me where did I live and I told him in Danville, Virginia, and I asked him where did he live and he said Calexico, California. And he said that he just came back from China. Then he asked me how many ships the Americans had and I said I didn’t know. He asked me how many airplanes the Americans had and I said I didn’t know. I said, ‘you should know better than I do.’

So he hit me on the side of the head with his fist and told me to go back to work.” (Court admonishes jury again received for limited purpose of enabling them “to judge from all the surrounding circumstances, the intent and state of mind with which the defendant acted, if you find from the evidence upon the close of the case that he did act as charged in the indictment.”) [Rep. Tr. p. 1835, line 7, to p. 1837, line 1.]

And the following day at the mine:

“A. Well, the air raid signal went off and everybody moved, and only the defendant and I was left, and he asked me if I knew that those were American planes and I said, ‘American planes have a smooth motor and the

Japanese planes sound like a Maytag washing machine,' and he hit me over the head and over the back with a piece of bamboo that he had and told me to go to the rest shack.

Mr. Lavine: I object to that as incompetent, irrelevant and immaterial, and not within the issues of this case, and not charged in the indictment, your Honor.

The Court: Is it offered on the issue of intent only?

Mr. Lillie: That is correct.

The Court: The objection is overruled * * *.”
[Rep. Tr. p. 1837, lines 10 to 22.]

And at the camp in January or February:

“A. The Japanese guard turned over to Kawakita and he went back to his office after the men was called up. Kawakita asked them what they was doing. They said they was getting some wood for a sick han. And he says, ‘Don’t you know you are not supposed to get it?’ He says, ‘We didn’t get it.’ So he told them to stand up on a stand that was setting right out in front of the jimisha and just a little to your right as you face it. So they stood there for some time. The working party was not in yet, and what Kawakita was going in and out of the camp that afternoon, * * *

Q. By Mr. Lillie: Kawakita then went into the jimisha, you say? A. He went into the jimisha and came back out sometime later. And one of the boys,—I don’t know which one—asked him, he says, ‘Don’t you think we have had enough punishment?’ It was very cold that day. And he says, ‘Face the United States.’ And one of the boys says, ‘Which way is the United States?’ So he went back into the office and a few minutes later he

came back out and told them to face in the direction which was just to the right of the main gate by the guard house. They faced that direction and he told them to salute; so they saluted. He went back inside; a few minutes later he came back out and they asked him the same thing; 'Don't you think we have had enough punishment for this?' So at that time he told the two boys standing on the stand, York and Tracker, to thumb their nose at the United States while he was having a big laugh so far at that time. He called the Japanese that was in the jimisha out and he was explaining to them in Japanese—which I didn't understand—but making the motion in his way (demonstrating), and everybody was getting a big laugh.

Mr. Carter: The witness has indicated with his hands with his thumb to his nose and fingers extended forwards.

The Court: Is that agreed?

Mr. Lavine: Yes; that is agreed.

Q. By Mr. Lillie: How long did this incident take place, to the best of your recollection? A. I don't remember how long, but just a few minutes after that he excused the two men on the stand and let them go back to the sick han.

The Court: Now, is that an incident charged in the indictment?

Mr. Lillie: No. That is for the purpose, your Honor, of showing the intent and state of mind of the defendant, for that limited purpose only.

Mr. Lavine: I move to strike it as irrelevant, incompetent and immaterial, and not within the issues of this case.

The Court: Motion is Denied * * *." [Rep. Tr. p. 1856, line 16, to p. 1859, line 1.]

And in June or July of 1945 while on the rock crushing detail:

“Q. And who was present at the time? A. Well, there was 15 of us working on that detail, and two men had just rolled up a bunch of rock, and I was standing there chucking these rocks in. Well, they shoved these rocks a little too far in the cart this day and they blocked this hopper up where it was crushing the rock. And Kawakita came up and he says, ‘I will be glad when all the Americans is dead, and then I can go home and live happy.’

Mr. Lillie: The purpose of that statement, also, your Honor, was to show the intent and state of mind.

Mr. Lavine: I move to strike as irrelevant, incompetent and immaterial, Your Honor, not within the issues.

The Court: Overruled. The evidence is received, again, for the limited purpose of enabling the jury to judge the state of mind or intent.” [Rep. Tr. p. 1860, lines 3 to 17.]

And on the same detail at night:

“Q. What did he say or do? A. Well, this one particular might he was sitting there, and he asked me, he says, ‘Why does the Americans hate to die and the Japanese like to die?’ And I told him back that the Americans had something to live for and go back to, and all the Japanese had was to live for a bowl of rice the following day.

Q. Did he answer you or do anything? A. Well, he answered me by hitting me over the head and across the back. And he couldn’t tell me to go back to work because we was working by bells. So I moved over away

to the other side of the han, the other side of the rest shack.

Q. What did he hit you with? A. He hit me with a bamboo stick he had been carrying around that night.

Mr. Lavine: Just a minute. I move to strike the entire incident as incompetent, irrelevant and immaterial, not within the issues of the indictment.

Mr. Carter: Offered for the purpose of intent and state of mind.

The Court: Motion denied, and the evidence is received on the issue of intent only." [Rep. Tr. p. 1861, line 15, to p. 1862, line 12.]

Witness James A. Caire.

In December of 1944, at the mine:

"Q. What did the defendant say if anything? A. We were discussing—

Mr. Lavine: Just a minute. I object to this as incompetent, irrelevant and immaterial, and not within the issues of this case.

Mr. Lillie: State of mind, your Honor, and intent.

The Court: Offered for that limited purpose.

The Court: Objection overruled. The conversation will be received for the limited purpose of bearing on the issue of intent or state of mind.

A. We were discussing the election, because it was election year, and he said 'Roosevelt was no good.'"
[Rep. Tr. p. 1981, line 3, to p. 1982, line 5.]

About ten days later, in the mess hall:

"Q. And what was the conversation? A. He asked me—

Mr. Lavine: Objected to as irrelevant, incompetent, immaterial, and not within the issues of this case.

Mr. Lillie: For the same purpose as stated previously, your Honor.

The Court: State it again.

Mr. Lillie: State of mind and also for intent.

The Court: Objection is overruled; the conversation will be received for the limited purpose, for whatever it may show relative to the state of mind or intent. You may proceed.

A. He asked me what I was doing in the rest han and I told him that I had been taken down with the cramps and my hanchō told me I could come down to the rest hut and stay until I got better. Then he went back and talked to the two Japanese, and later came back and told me to go out and dig dikons for the next day's meal.

Q. By Mr. Lillie: And did you proceed to go out and dig dikons? A. Yes; I did. It had been snowing that day and I had to dig them with bare hands." [Rep. Tr. p. 1983, line 10, to p. 1994, line 6.]

Witness Woodrow T. Shaffer.

In November of 1944 at the mine:

"Q. And what was said at that time by the persons then and there present?

This is offered for the purpose of showing intent and state of mind of the defendant. It is not one of the overt acts.

Mr. Lavine: To which we object, your Honor, as irrelevant, incompetent, immaterial, and not within the issues of the case.

The Court: Overruled. It will be received for that limited purpose only.

* * * * *

A. Kawakita told me and the other prisoners of war working on the same detail if we would get out eight cars of ore we could knock off. On the same detail the following day—

Q. Now, wait a minute. Did you get out eight cars of ore on that day? A. Yes.

* * * * *

Q. All right. Now, what was said by the defendant and other persons present at that time and place?

Mr. Lavine: To which we object, irrelevant, incompetent, immaterial, not within the issues of this case.

Mr. Carter: Offered, as was the first conversation, for the purpose of showing intent and state of mind of the defendant.

The Court: The objection will be overruled and the evidence will be received for that limited purpose only, as showing the state of mind or intent. You may answer.

A. Kawakita said that we would have to put out 10 cars that day because we quit too early." [Rep. Tr. p. 2043, line 7, to p. 2045, line 23.]

And on the general subject of winning the war at the mine in November, 1944:

"Q. What was said by the defendant at that time and place and what was said by anyone else who was then and there present? A. I asked Kawakita—

The Court: Is this offered—

Mr. Carter: Again, for the purpose of showing intent and state of mind of the defendant.

The Court: It will be received for that limited purpose.

A. I asked Kawakita how the war was coming. He said Japan was winning but it didn't make any difference whether they won or not, we wouldn't get back home, anyhow. He said that after Japan had won the war he was coming back to the United States and be a big shot because he could speak the English language." [Rep. Tr. p. 2046, line 16, to p. 2047, line 5.]

And early in December 1944 in the rest hut at the mine:

"Q. State what was said by the defendant and anyone else then and there present at that time.

Mr. Lavine: Objected to as irrelevant, incompetent and immaterial.

Mr. Carter: Offered for the purpose of showing the intent and state of mind of the defendant.

The Court: Objection overruled. It will be received for that limited purpose. You may answer.

A. Kawakita told us lazy yanks to get out there and get our cars rolling.

The Court: What did he say?

Q. By Mr. Carter: Use his words as nearly as you can, Mr. Shaffer.

A. 'You lazy Yanks, get out there and get your ore cars rolling.' "

Witness Alfred A. Hale.

In May or June, 1945, in the kitchen in the camp:

"Mr. Carter: This is offered on the subject of intent and the state of mind of the defendant.

Mr. Lavine: I still object to it, your Honor, as irrelevant, incompetent, immaterial, and not within the issues of the case.

The Court: Very well. The objection is overruled. The testimony will be received for the limited purpose as it bears on the issue of intent or state of mind.

Q. By Mr. Carter: What did you hear and see at that time and place, Corporal? A. I walked up to the kitchen door. I was standing just outside the kitchen door and I heard Kawakita say, 'Well, it don't make a damn to me which way the war goes because I am going back to the States anyway.' " [Rep. Tr. p. 2159, line 19, to p. 2160, line 7.]

Witness Irvin L. Abbott.

In December 1944 at the messhall at the mine in the presence of the mine detail of around 200:

"Q. State what you heard the defendant say, if anything, and what happened at that time and place?

Mr. Lavine: Objected to as irrelevant, incompetent, immaterial, not within the issues of this case.

Mr. Carter: Offered for the purpose of showing the state of mind and intent of the defendant.

The Court: Objection is overruled. The evidence will be received for the limited purpose stated.

A. Why, he was in a little room adjacent to the large mess hall where the hanchos, the Japanese interpreters, were eating their lunch. They hadn't started eating at that time. They were smoking and sitting around. Kawakita called out a number, one of the men's number, and told him to bring his box of rice and bring it up there, and he made him turn it over so that he couldn't have it for his noon meal. He said, 'This man reported in sick.'

He says, 'Anybody who is too sick to work is too sick to eat.' " [Rep. Tr. p. 2218, lines 5-21.]

And on the day that work finally ended in the camp; on August 14, 1945, when the factory detail returned to camp:

"Q. What did you see or hear at that time and place? Just a minute. Let us have our objection before the witness starts to answer it. This is only for the purpose of showing intent and state of mind of the defendant.

Mr. Lavine: I object to it as incompetent, irrelevant and immaterial, and not within the issues of this case.

The Court: The objection will be overruled and the evidence will be received for the limited purpose of showing intent or state of mind. You may answer the question.

A. Kawakita spoke up and he said, 'You American bastards will be well fed,' or words to that effect, 'You will be getting fat from now on.' That was it." [Rep. Tr. p. 2221, lines 4-15.]

Witness Hardy M. Wooldridge.

In November or December, 1944, at the mine:

"Q. What did the defendant—pardon me.

This, if the court please, is for the purpose of intent and state of mind, and is not one of the overt acts.

Mr. Lavine: Objected to as irrelevant, incompetent, immaterial, and not within the issues of the case.

The Court: The objection is overruled. The evidence will be received for the limited purpose offered, namely, only insofar as it bears upon the issue of intent or state of mind.

Mr. Lillie: Thank you.

Q. Was there a conversation there at that time? A. Yes, there was.

Q. All right. Will you tell the court and jury what the conversation was and who said what? A. Kawakita came up to our hanchō, who was Sgt. Rizo—

Mr. Lavine: May my objection go to the entire incident?

The Court: Yes; and this entire incident is received for the limited purpose offered, namely, as it bears upon the issue of intent and state of mind only.

Q. By Mr. Lillie: Will you continue, Sergeant, please? A. Sgt. Rizo and Kawakita, as he came up, were talking. Kawakita asked him why we couldn't get more ore out. And this was a rocky level and we had to dig rock, had to carry the rock and dump them off the hillside, push the cars back. And he told him that it just taken a lot more time. And he told him he wanted us to hurry up and try to get out more ore, try to get out as much as the No. 2 level which was below us, but they had soft dirt to work in. It was very rocky at the level we were working, and he tried to explain that that was the reason we couldn't get any more ore out than we did.

Q. Who said that? A. Kawakita. Sgt. Rizo told Kawakita.

Q. Stated that to Kawakita? A. Yes, sir.

Q. What was Kawakita's answer in respect to that, if anything? A. He told him that didn't make any difference; we should be able to get out as much ore as they were down below us." [Rep. Tr. p. 2432, line 1, to p. 2433, line 16.]

Also in December of 1944 at the rest shack at the mine:

"Q. And what did the defendant say, if anything, at that time?

Mr. Lavine: The same objection, your Honor, irrelevant, incompetent, immaterial, and not within the issues of this case.

A. He ran us out of there—

The Court: Just a moment.

Mr. Lillie: It is for the limited purpose of intent and state of mind, your Honor.

The Court: The objection is overruled. The evidence is received for the limited purpose stated, to enable the jury to determine the issue as to state of mind or intent with which the defendant acted, if the jury should find from the direct testimony of two witnesses to the same overt act that the defendant did one or more of the alleged overt acts charged in the indictment.

Q. By Mr. Lillie: Just tell me what the defendant said, if he said anything, Sergeant. A. He told us, asked Sgt. Rizo how long we had been in the shack. He told him he didn't know. We hadn't been there long. He told us to go back to work. And he said, 'Well, we haven't had our full break period.' He told him that didn't make any difference; go back to work, and which we did.

Q. Who do you mean by 'he'? A. Kawakita." [Rep. Tr. p. 2436, line 8, to p. 2437, line 8.]

Witness William L. Bruce.

In November 1944, when witness was being examined for identification:

"Q. What happened at that time and place, and what was said, if anything, by anybody present?

Mr. Carter: This is offered for the purpose of proving intent and state of mind of the defendant.

Mr. Lavine: To which we object as incompetent, irrelevant and immaterial, and not within the issues of the case.

The Court: The objection will be overruled and the evidence will be received for the limited purpose offered—that is to say, for the purpose of showing intent or state of mind with which the defendant acted, if you find from all the evidence upon the close of the case that the defendant did act as charged in the indictment.

* * * * *

A. The defendant asked me what my name was and I stated it, and he asked me my organization and where I had been taken a prisoner and told me to pull off my shirt, that he was looking for identification marks.

Well, being tattooed on the upper and lower right arm I immediately rolled up my sleeves and I said, "Tattooes on right forearm," and he reached over and pulled them like this, and pinched them, and told me to take off 'my damned shirt'; that he was looking for identification marks, and I immediately pulled my shirt off." [Rep. Tr. p. 2755, line 24, to p. 2757, line 11.]

In November 1944, at the mine, when Smiling Sam gave the POWs some roasted nuts:

"Mr. Carter: If the court please, this is again offered on the matter of the state of mind or the intent of the defendant.

Mr. Lavine: To which I object as incompetent, irrelevant and immaterial, and not within the issues of the case.

The Court: The objection will be overruled and the evidence will be received for the limited purpose offered. You may answer the question.

A. It was getting pretty cold in the latter part of November and I believe it had started, maybe, perhaps, to sleet or snow, and the Japanese were carrying their winter supply of wood out to the mountains where we were work-

ing, and one of the Japanese stopped in and was talking to our hanchō, this Smiling Sam, and he had a bag of acorns or hickory nuts or whatever they were. They were nuts.

* * * * *

Then did you get some of the nuts? A. Yes.

Q. What did you do with them? A. My ore car—the rest period was over—shortly after the rest period was over, shortly after these nuts were given to me, we took our ore car on down to the hoppers, which was about three-quarters of a mile, and dumped it into the hoppers, and on the way back up I believe it was Evans or Blanket would push. I pushed while he ate his nuts, and he would hold his head against the back of this ore car like he was pushing, too. Well, we got about half way up there and he says, ‘All right, I will push and you eat your nuts.’

Q. Then what happened? A. I just started to eating them and the defendant here hollered, ‘What in the hell have you got there?’

* * * * *

Q. All right, what else was said if anything at that time and place? A. And I showed Kawakita what I had in my hands and he slapped them out of my hands and told me I would be sorry for going into the woods and getting nuts when I should have been working. I tried to explain to him that they were given to me by this hanchō and he immediately turned around and walked off. He wouldn’t listen to what I had to say.” [Rep. Tr. p. 2758, line 23, to p. 2761, line 5.]

In April or May of 1945, while on the night shift at the smelter :

“Mr. Carter: This is again offered for the purpose of showing intent and state of mind of the defendant.

Mr. Lavine: To which we object as irrelevant, incompetent and immaterial.

The Court: The objection is overruled; the evidence will be received for the limited purpose stated.

* * * * *

A. We were working in the finished ore shed where the ore, after it had been finished, was stored in this room to be put on railroad cars. And about 8:00 o'clock or a quarter to 8:00 in the morning the Japanese hanchō in charge, which I knew as 'The Old Man' or 'Jo-To Hanchō' and various other names, told us to wade out of this water and take a break, take a smoke.

Q. By Mr. Carter: Did you have any cigarettes?

A. No.

Q. On your person at that time? A. No; I didn't have a cigarette.

Q. Well, did you get a cigarette on that occasion?

A. Yes; I did.

Q. From who? A. This 'Jo-To Hanchō.' We told him we couldn't take a smoke because we didn't have any cigarettes; so he took a Japanese cigarette and he broke it in two and he handed half of it to me and half of it to one of the fellows that was working there.

Q. What did you do? A. And I stayed there a few minutes and didn't have a match and he told me, 'You don't have anything.' And I told him, 'No.' And he walked over and lit my cigarette and I leaned back on my shovel, a shorthanded shovel, and I had just started to put it to my face about the second time when I heard something running, and just as I turned around the defendant hit me in the mouth and knocked this cigarette and the fire all over my face, and told me that all I was supposed to do was work for the Japanese people. But I tried to explain that this hanchō had given me the cigarette and he immediately turned around and walked off, laughing." [Rep. Tr. p. 2764, line 24, to p. 2767, line 5.]

S.

Dr. LeMoyne Bleich, senior American officer in the camp, testified as follows [Rep. Tr. pp. 3406-3410]:

A. By Mr. Lavine: Now, Doctor, in respect to Philip D. Toland, you have notations here as to his professional visits to you. Does this card truly reflect the various professional visits that Philip D. Toland made to you as a doctor during that period of time as indicated by the card? A. Yes.

Q. Now, you have various notations made in connection with the card and particularly in connection with the last column of the card. Will you explain those notations, Doctor? A. Yes. In the last column of the card there appear the letters W or R. Sometimes it is RS and sometimes H. It is usually W or R which stand for work and R stands for rest—being kept within the camp, whether on a hospital status or just a rest status, there being very little physical distinction between hospital or plain rest. So if I saw a man and made some complaint and I was able to give him either some advice or some medication and yet still felt, by the standards we were then using, he was still capable of going to work, I marked him W. However, if I felt he should not go to work I marked him R and then the Japanese were asked if we couldn't keep him in until he became ready to go to work again. That is what this last column would indicate, whether the man was at work or whether he was within camp at rest.

Q. Now, commencing with August, 1944, you examined him and made some notations and then you marked him down for light duty, didn't you? A. That is right.

Q. Instead of work or rest? A. That is right.

* * * * *

Q. Now, you have a notation as to where you thought he could work and what does that notation show? A. I requested that he be put on light duty at the factory and he stayed in that status until the 8th of December and he again went on rest and was on rest from the 8th to the 21st at which time he went on a light duty detail which we called the "benjo party." It was a group of men whose duty it was to dip the latrines and carry the refuse out to the garden. That was considered light duty.

Q. And that was inside the camp, was it not? A. It was within the camp and in the gardens around the camp compound.

Q. And how long did that continue? A. Apparently he stayed on that until the 26th of January when again it was necessary to rest him. He stayed on rest then until the 15th of April. He worked then until the 18th of April. He rested until the 21st and then again went to work. Do you want this continued?

Q. Yes, please. A. He worked from the 21st of April to the 15th of August. At that time he went—that was a light duty job he was on, what we called the garden party, men working around the truck gardens adjoining the camp. Of course the 15th of August was V-J Day and after that I have no specific notation as to whether he was in a work status or rest.*

*This is the period which Toland and other government witnesses placed him lifting ore rock, an entirely different job at the factory.

Q. All right; thank you. Doctor, referring now to Defendant's Exhibit BH in evidence, I will ask you to decipher for us the card that you have made of J. C. Grant. Now, just—

Mr. Carter: BH?

Mr. Lavine: Yes, BH in evidence.

Q. When did he first see you and how frequently did he see you? A. My first note here is in September. I examined him previously in August. It was not until early September that I got these cards so we start in September. On the 11th of September Grant was on rest and stayed on rest until the 13th of September; then he worked to the 12th of January; then he rested from the 12th of January to the 2nd of February; then he worked from February 2nd to March 28th; rested from March 28th to May 15th; worked from the 15th of May to the 29th of July, and subsequent to that he was considered on rest. [Rep. Tr. pp. 3406-3410.]

Excerpts from testimony of Dr. LeMoyne Bleich, American medical captain in the camp. His records show no complaint against Kawakita. His testimony is corroborative of defense witnesses that Kawakita took prisoners to the dentist, asked for extra vitamins from the company for Americans, and his request was complied with:

Q. Would you just tell us what occurred with reference to giving the men dental treatment and what you did with respect to it? A. Yes. Apparently before we had come to the camp it had been possible for the British-Canadian group, upon occasion, to take some men who needed dental treatment badly to a local civilian dentist, Japanese, whose offices were within easy walking distance

of the camp, perhaps a mile or two. And when we first got there, there was no attempt made to have any dental treatment done. But the matter was again brought up by Major Beadnell, who asked Sgt. Harvey to see if the Japanese would again allow us to take men to the Japanese dentist for treatment. And Sgt. Harvey made representations to the Japanese, and subsequently we were allowed to take limited number of men who were in very, very dire need of dental treatment to this local Japanese dentist, and he was paid by the prisoners.

Q. In what manner was he paid by the prisoners?

A. He would make an estimate of the amount of work he had to do and, upon completion of the work, he was paid in yen which we as prisoners had received as pay. In fact on one occasion a letter was written to the Japanese requesting that myself, Major Beadnell, Lt. Bryant, and one of the Canadian lads who was custodian of the funds be allowed to draw a sum of money from the Japanese bank or postal savings where some of the pay which they had given us was on deposit. And after this letter had been received, it was acted on in a matter of several weeks or a month, and we received, I believe, one or two thousand yen of our money so that we could pay this Japanese dentist.

Q. Did you have occasion to receive vitamins or extra medical supplies at any time while you were in the camp?

A. There were, originally, the Japanese supplied a vitamin B powder. I believe it probably was a dried yeast which was issued to us, and those we used. There were also some Red Cross Vitamins available which we used, also, what I believe to have been some rice polishes which were available to us.

The Court: When you say "Red Cross" what Red Cross?

The Witness: Our Red Cross, the American Red Cross multi-vitamins. We got some of those. I have forgotten exactly the date, but they were available to us in small amounts.

Q. By Mr. Lavine: Did some of these supplies come from the company? A. I understand that some of the medication was supplied by the company.

The Court: By the "company" what do you mean?

The Witness: I mean the company which operated the mine and the factory where the men worked.

Q. By Mr. Lavine: That is the Nippon Yakin Metallurgical Company? A. I don't know what its name is.

Q. Doctor, you spoke this morning about not having been to any hospital in the mine. Was there some medical hospital attached to the ore mine? A. I was told there was.

Q. Sort of an emergency hospital? A. I understand that is what it was.

Q. And Doctor, in connection with the food situation was that getting gradually scarcer and scarcer as the time went on in your confinement in Japan? A. Yes.

Q. And did you receive rumors or reports regarding the progress of the war or the defeat of the enemy while you were in camp? A. Rumors were always present and we think we had some information.

Q. As a matter of fact you made some diary entries about Germany being defeated and you hoped the war would be at an end soon, didn't you? A. Yes.

Q. In substance? A. Yes.

Q. Doctor, were there rules and regulations forbidding the men—strike that and withdraw that question. Was there a situation with reference to food which made it important for you and the other officers in the camp to prevent any stealing of food from one and another or from any other source because of the shortage of food? A. Yes.

Q. And what was the reason for that? A. Well, there were several reasons. First of all the amount of food was barely adequate to maintain the men even though they had their full share, so any stealing would jeopardize the entire group. Secondly, we were aware of the shortage of food generally and the Japanese forbid stealing. Particularly did they admonish against stealing from the gardens and that I not only agreed with because the gardens were being fertilized with human excreta. It would have been foolhardy for the men to have stolen any garden produce and eaten it without duly cooking it which, of course, they couldn't do it unless it came through the regular channels.

Q. And did you yourself issue orders against stealing food from the garden? A. Yes.

Q. Now, Doctor, on November 3rd you made a reference with reference to that matter. In your diary of November 3rd, 1944, Friday:

“This A. M. Four Britishers caught stealing sweet potatoes and were beaten at order of Nipponese. They deserved it though for such action redounds to the disfavor of all.”

Was that a recordation that you made at that time? A. Yes, that is quite correct.

Q. And Doctor, this morning I asked you something about Major Beadnell as referred to in your diary and you wrote at that time:

“Major Beadnell gave me some much needed advice last Saturday. He believes I am too familiar with the troops. Perhaps I am. At any rate we have had Lt. Bryant placed in command and I am just the doctor. That is what I want. I believe it is good to have Bryant in charge. He is a line officer and should be. Besides it relieves him from going out to labor.

“I do hope what I have done is for the good of men. Frankly I believe all I have done has been A. M. D. G.”

Q. Would you interpret that? A. “To the greater honor and glory of God.”

Q. “Although it may have caused me to lose some social respect. To become the aloof officer seems foreign to me. We are all in this together and it is none too pleasant at best. I feel hypocritical. Then too I have gotten nowhere with the Nipponese. I had hoped to do so much yet getting anything from them is like opposing a stone wal.”

Then in reference to Major Beadnell you said a little later:

“I have the impression that Major Beadnell is not playing fair. I know he is keeping in men more fit than some I am sending out. He is also using our pitifully small store of sulfaquanadine and I am not. Maybe he really needs to but I doubt it. Yet I cannot accuse him. I have no proof. I want to play the game squarely yet how can I if I am not sure. I wish our two doctors were more intimate then we could arrive at some set policy. I wish we were all British or all Americans in this camp.”
[Rep. Tr. Vol. XXIII, p. 3399, line 4, to p. 3405, line 13.]

T.

On questions of intent Kawakita testified [R. 4143]:

“Q. Did you ever tell anybody in the camp that you were an American citizen born in Calexico? A. Never did.

Q. Did you ever tell anybody in the mine or the factory that you were an American citizen born in Calexico? A. No, sir. [R. 4143.]

* * * * *

Q. Did you have anything to do in recording their record or entries of where they came from or who they were or in making a list of their entries? A. No, sir.

Q. Did you ever have any discussion with Bruce about nuts or acorns? A. No, sir.

Q. Did you strike Bruce or knock out of his hand some nuts or acorns, or from his mouth or any part of his body? A. No, sir.

Q. Did you tell him he had no right to go into the woods and get nuts when he should have been working? A. No, sir.

Q. Did you have any authority to tell him anything like that? A. No, sir.

Q. And did you tell Bruce that he had no right to smoke a cigarette? A. No, sir.

Q. Did you strike a cigarette out of his mouth? A. No, sir.

Q. If you had done so after a Japanese military official or foreman had given him a cigarette would you have been subject to military punishment? A. Yes, sir.

Q. And what punishment would you have been subject to? A. Be severely punished.

Q. Did you at any time tell Bruce or any prisoner of war any of the things that I have read to you or asked you here, whether you knew them by the name I have designated them or in any manner, shape or form? A. Never did.

Q. In other words, if the prisoner of war was not known to you by the name which we have called them here, but by some number or there was some other prisoner of war; would your answers be the same as you have given them to me heretofore? A. Yes, sir.

Q. Mr. Kawakita, how did the end of the war get announced at Oeyama? A. On August 15th, at about 11:30 in the morning, there was a special announcement that the Emperor will make a broadcast on or about 11:30 that morning. So, I was working at the warehouse office and I noticed on the ground where the employees assembled, they were putting out a couple of loud speakers connected to radios. So, everybody assembled so they could hear what the Emperor said.

Q. And then what happened? A. After the Emperor spoke to the radio there was a common analysis of his broadcast so that everyone could understand it as a news commentator.

Q. And after the broadcast did you continue working? A. I stayed at the company until that evening when I went home—when I went back to the dormitory.

Q. And after you went back to the dormitory where did you report the next day or the day after that? A. The next day when I went to the camp, the camp authorities told me to come to the camp and help Mr. Fujisawa, to help the American prisoners of war which was going to be handed—to help the American prisoners of war after they would take over the camp.

Q. And who took over the camp? A. The officer?

Q. Yes. A. It was Major Martin who took over the camp.

Q. And what other officers took over the camp under him? A. I remember a lieutenant named Thompson, who was a provost marshal and there was a captain by the name of Olson.

Q. Then after they took over the camp did you get instructions from them? A. Yes.

Q. What did you do after that? A. I went to Major Martin to report and he said that he (*sic* I) had to take orders and interpret the orders to the Japanese people which the officers and Mr. Martin will say to do.

Q. And what did you do from that time on? Just tell us what you did; did you report to the camp every day? A. I reported to camp every morning about 7:10 in the morning and stayed there until sometimes 9:00 o'clock, 10:00 o'clock that evening.

Q. And what work did Major Martin or the other American officers have you to do? A. I went with Major Martin to the factory office, which was the Oeyama branch office located at the factory, and I interpreted for Major Martin, at his request, of something having a telephone installed within the camp grounds.

Q. And then after that what did you do? A. Then after, when the B-29s started dropping medical supplies, food, clothing around the area, I went with two or three officers to make sure that the natives, these Japanese civilians in that area, would not steal them. And I interpreted for the company to get the trucks ready to bring the supplies that were dropped from airplanes to the camp.

Q. You say two or three officers; what kind of officers were they? Were they American officers? A. American officers.

Q. Just where did you go to pick up these supplies? A. On one occasion we received the—the camp received a phone from the Port of Miazuru which was a Japanese naval port on the side of the Japan Sea, and it was reported that the B-29s had dropped on two different places near the City of Maizuru. Next morning, I think it was Capt. Olson and I and another officer, went on the train, rode on the train about an hour to the city of Maizuru and reported to the Japanese military office which was still functioning there, and from the military officer—I think he was lieutenant or captain—told us that the airplane, the B-29 dropped some food or some supplies on the Japanese civilian homes, and also at the Japanese naval prison which was located in the mountains about three or four miles from the outskirts of Maizuru.

First, we went to the Japanese—to the civilian home where they dropped, and the American officers surveyed the damage, and then in expressing their regret as to what happened because the supplies fell on the house and made a big hole. And I still remember there was a couple of childrens about eight or nine years old being injured. And I interpreted for the American officers, expressing their regret that things happened like that. And I still remember that the American officer left some chocolates and a carton of cigarettes, I think or something like that to the family over there, and I interpreted what they said to the Japanese family. Then we went to the naval base—

Q. When you say “we,” was Capt. Olson an American captain? A. Yes, sir.

Q. A captain in the American army? A. Yes, sir.

Q. When you say "we went" who was we? A. There was Capt. Olson and a couple of officers and I.

Q. A couple of American officers? A. Yes; a couple of American officers and I.

Q. All right. Where did you go? A. After we went to that home we went to the Japanese naval prison and reported to the prison administrator, and he guided us to the hills which was about on the other side of the cell block, outside the walls on the hills, to see where the supplies had dropped. But early that morning the Japanese inmates in the prison had already brought some of it down to the administration building. We saw them bringing the rest of it down.

Q. What else did you do during the period of time? A. I remember on one occasion I went with Major Martin and Lt. Thompson to the police station at Miazui, which is about four or five miles from the camp and the factory. I went at the Miazui police station. Major Martin requested to the Japanese chief of police at that station for prophylactic station, and Major Martin asked him to use one of the rooms on the second floor and one room for a provost marshal's office, and the Japanese police, chief of police, said that he will give certain rooms to him so that the prisoners of war could use as a prophylactics station and office for the provost marshal.

Q. Then after that occasion did you go down with some officers again down there? A. Yes, sir; we went. I went with a couple of American officers. There was a group of American officers—I don't know their names—and they wanted to go to a Japanese hotel. So they wanted me to interpret for them, and one of the resort hotels in the town of Miazui which was located on the shore, and

we managed to get, to rent a big room and we had a lunch at that place at the hotel.

Q. And about how many American officers were there at that time? A. There were about eight to fifteen officers at that time when we went to the hotel.

Q. Then did you on subsequent occasions render other services to the Americans after they took over Camp Oeyama? A. Yes, sir.

Q. What else did you do? A. There were excursion trips to one of the Amanohashidate, which is one of the three sceneries of Japan. It was located on the bay of Miazui. And we went on the barge from the place near the camp. The Miazui dock facilities furnished the barge and the tug boat, and we went on there to the Amanohashidate. We climbed the mountain or hill, which was not so high, and the Nariai-Zan it is called in Japanese. You could see the Amanohashidate and the Miazui Bay.

Q. After that did you render other services to the American officers and personnel who had taken over the Camp Oeyama? A. Yes, sir.

Q. What other things had you done? A. When the prisoners of war were ready to leave. There were some notification to the Major that they wanted the prisoners of war to leave a certain date, and Major Martin and I went to Iwataki-Guchi station, which is the station where the prisoners of war entrained. And it was the day before that Major Martin and I went to see the station master to arrange the train, so many cars, so many coaches, so many baggage cars for the freight to be taken to the destination. And I think Major Martin told him—I interpreted what Major Martin said and the content. He said that he needed two different groups because there

was 600 men in the camp, and the Japanese station master said that that was right, because there is only—on passenger trains the length is limited, the length of the coaches, how many coaches are attached to an engine, so it is best to have two different trips, two different groups leave there.

Q. And on the day that they left did you assist the men in getting off on September 9, 1945? A. Yes. Major Martin ordered me that morning to get two trucks and get the supplies, surplus supplies which the prisoners of war did not use during their stay from the 15th of August to the day they left. So we loaded all the things that the prisoners of war wanted to take and the supplies, and took them to the station and the train was ready about one hour before they left and we loaded everything on. The Japanese that were working on the truck, and there was a couple of American prisoners of war helping load the freight on the train so they could leave together with the coach and the freight cars. It was the baggage car they loaded in.

Q. Did you see them leave finally? A. Yes, sir. It was about 10:30 in the morning when they left the Iwataki-Guchi station, and I told the boys, we all greeted them farewell, and some of the boys told me they would like to see me. We said this might be a small world so they might see us, and there was a lot of noise at the station.

Q. At any time prior to the time they left did anybody ever question you or ask you or interrogate you as to whether you had committed any act of treason? A. No, sir.

Q. Did any officer of the American occupying forces seize you or question you in any manner, shape or form

as to whether you had committed any act of treason? A. No, sir.

Q. Did you afterwards go to work somewhere else in Japan? A. Yes.

Q. And where did you go to work? A. I went to work in November with the Wakasa Kogyo Kabushiki Kaisha.

On the question of intent, Kawakita said:

Q. In the late spring or early summer of 1945, within the confines of Camp Oeyama did you participate in or assist the military personnel of the camp in directing and executing any punishment upon Woodrow T. Shaffer? A. No, sir.

Q. Did you at any time tell Woodrow T. Shaffer that he should kneel or be placed upon a platform or be otherwise punished? A. I did not have any authority to say so.

Q. Well, did you say that? A. No, sir.

Q. Were you present when such a thing occurred? A. No, sir.

Q. Where were you working during the late spring or early summer of 1945? A. I was working at the warehouse office as a clerk.

Q. In October of 1944 did you at any time order and command Nathan Sutton, who is also known as Nathan Solomon, and Frank Mino, to replace a loaded ore car on the rails? A. No, sir.

Q. Where were you working in October of 1944? A. I was working at the mine at that time.

Q. Did you at any time order these men to replace any loaded cars? A. No, sir.

Q. Did you have any authority to give any such orders? A. No, sir.

Q. Did you strike and beat Nathan Sutton and Frank Mino? A. No, sir.

Q. Did you at any time while you were working in Oeyama ever have any intent to betray the United States? A. No, sir.

Q. Did you at any time while you were working in Oeyama have any intent to give aid and comfort to the Japanese government? A. No, sir.

Q. Did you at any time while you were working in Oeyama do this work with any intent to help the United States lose the war and help Japan win the war? A. No, sir.

Q. Did you at any time do anything there to compel any members of the American armed forces to become abjectly subservient? A. No, sir.

Q. Did you at any time do anything to attempt to destroy the morale and the physical and mental well-being of the members of the armed forces of the United States? A. No, sir.

Q. When you came to Oeyama after your return from China did you at any time do any work in classifying or helping to classify any of the prisoners of war by identification? A. No, sir.

Q. As far as you knew, were the prisoners already all classified and entered? A. So far as I know, I think they were.

* * * * *

Q. And just explain whatever you want to explain to us. How did it happen? A. The Japanese Foreman told

me to interpret, to interpret to Sgt. Montgomery that he used vulgar language in Japanese, which was very hard to explain in English and I didn't want to explain it the same, the exact way the foreman said in Japanese.

Q. Then did you use language comparable or did you use milder language in interpreting? A. It was much milder language which I interpreted.

Q. Did you ever say any of these things on your own initiative? A. No, sir.

Q. The Sergeant also said that you said: "Come on. Get to work. Come on. Snap out of it and hurry up." Did you say words somewhat like that or words to that substance and effect? A. I interpreted what the Japanese foreman told me to interpret to the men.

Q. Did you ever say those things on your own initiative? A. No, sir.

Q. Did you ever have a conversation with Sgt. Carrier in which you said in substances and effect—in which you discussed General MacArthur? A. No, sir. There was orders at the camp not to talk anything about the war, politics or anything, or about ourselves.

Q. Did you ever say to Carrier in substance and effect that General MacArthur was—that you thought it was dirty of General MacArthur to leave us like that. He wasn't no good. Did you ever say anything like that to Carrier? A. No, sir.

Q. Or to any prisoner of war? A. No, sir.

Q. Did you ever say to a prisoner of war named Ennis—did you ever discuss with him the new factory building that was being built on the ground? A. No, sir.

Continuing on from this point [page 4118 of the record to 4148] Mr. Kawakita categorically and specifically denied each and all of the conversations contributed to him, in part as follows:

Q. Did you say to him in substance or effect when he asked you if this was another nickel factory, did you say to him, "It is going to be a dime factory"? A. No, sir.

Q. Did you have any discussions with him about where he was from or where you were from? A. No, sir. There was orders not to talk about ourselves posted. It was told by Lieutenant Hazama.

Kawakita explained that it would have been a violation of orders to have had these discussions and that he might be severely punished or killed if he did so. [R. 4130.]

From here to the conclusion of his testimony he denied testimony offered by the government to show intent. [R. 4130-4148.]

No. 12,061

In the
United States
Court of Appeals
For the Ninth Circuit

TOMOYA KAWAKITA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 12,061

Appeal from the District Court of the United States
for the Southern District of California
Central Division

Honorable William C. Mathes, Trial Judge.

Appellant's Reply Brief

FILED

NOV - 3 1950

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**In the
United States
Court of Appeals
For the Ninth Circuit**

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**THE DUTY OF APPELLATE COURT IN TREASON
CASE IS TO RE-EXAMINE ALL EVIDENCE
AND REVERSE IF BASED UPON PERJURY,
PASSION OR INADEQUATE EVIDENCE.**

The appellees have largely based their reply on the fact that there was a verdict by a jury and, therefore, on appeal the court should follow the findings of the jury.

However, this overlooks both the practice and procedure followed by the Supreme Court of the United States in treason and due process cases.

Constitutional Requirement Must Be Met

(1) Where there is a treason case before it the Court will re-examine all of the evidence in the case to see if there has been a fulfillment not only of the *constitutional requirement* in a treason case but of the sufficiency of the evidence to sustain the conviction of the highest crime that is charged. . . . Thus, in the case of *Cramer v. United States*, 325 U. S. 1, Mr. Justice Jackson closely analyzed all of the facts. He pointed out in his learned opinion that the Framers of the Constitution were concerned “to guard the treason offense against . . . or (2) conviction of the innocent as the result of perjury, passion or inadequate evidence. . . . The second danger lay in the manner of trial and was one which would be diminished mainly by procedural requirements—mainly, but not wholly, for the hazards of trial also would be diminished by confining the treason offense to kinds of conduct susceptible of reasonably sure proof.”

Re-Examination Must Be Made to Determine That Conviction Is Not the Result of “Perjury, Passion or Inadequate Evidence.”

It is implicit in the opinion that the Supreme Court there stated that the evidence should be re-examined fully by the appellate court, and that court did re-examine all of the evidence to see that conviction was not the result of “perjury, passion or *inadequate evidence*,” and the court there found that the evidence

was *inadequate* and after *re-examining* all of the facts the court held that they were insufficient to sustain Cramer's conviction. The court said as follows:

“ ‘Prosecutions for treason were generally virulent.’ Time has not made the accusation of treachery less poisonous, nor the task of judging one charged with betraying the country, including his triers, less susceptible to the influence of suspicion and rancor. The innovations made by the forefathers in the law of treason were conceived in a faith such as Paine put in the maxim that ‘He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach himself.’ We still put trust in it.” (89 L. Ed. 1468).

In *Haupt v. United States*, 300 U. S. 631, at page 635, the court again meticulously reviewed all of the evidence to determine if there was sufficient evidence to sustain a conviction against Haupt. The court again re-examined all of the evidence. The court, there, in commenting on *its* holding in the *Cramer case* which reversed the jury findings said:

“It was reversed because the *Court found* that the act which two witnesses saw could not on their testimony be said to have given assistance or comfort to anyone, whether it was done treacherously or not.”

Showing that the Supreme Court also thought it was necessary to re-examine the evidence, it stated:

“The most difficult issue in this case is whether the overt acts have been proved as the Constitution requires, and several grounds of attack on the conviction disappear if there has been compliance with the *constitutional standard of proof*.”

This is the second reason why the reviewing court must review the evidence in a treason case.

Re-Examination Required to Determine If There Has Been Due Process

A third reason presented by our case is the *requirement of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States*. The Supreme Court has held that where due process is involved—that is, the issue of whether there has been a fair trial, the court will itself re-examine all of the evidence to determine not only whether there has been fair trial, but whether the quantum of evidence measures up to the standard required in order to show that no fair trial was accorded.

Lisenba v. California, 314 U. S. 219, 86 L. Ed. 166.

And, the Supreme Court has always said that in the Federal Courts the court has supervisory power over the course and conduct of criminal trials generally in its courts.

The appellees resting their case upon the verdicts of the jury shows that they regard the *facts* as weak, inso-

far as it ever establishes any element of treason, or betrayal of the United States.

This being a death penalty case, and issues of due process of law being involved, the Supreme Court of the United States has said that in such a case it is its duty, independent of any verdict of the jury, to re-examine the facts and determine whether due process has been accorded. (*Chambers v. Florida*, 309 U. S. 227; *Lisenba v. California*, 314 U. S. 219, 86 L. Ed. 166; *Ashcraft v. Tennessee*, 322 U. S. 143; *Malmiski v. New York*, 324 U. S. 401, 404, 89 L. Ed. 1032).

“Circumstances equally consistent with either hypothesis prove neither, and the party having the burden must fail,” (*Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333, 77 L. Ed. 819; *Mutual Life Insurance Company v. Hess*, 161 Fed. (2d) 1, 4). The federal rule therefore is to re-examine the entire record to see if as a matter of law the crime has been legally established. Where the constitution defines the crime it is mandatory upon the court to re-examine the entire cause.

Where Facts Uncontradicted Issue of Law Arises

Where the uncontradicted facts prove a proposition contrary to the finding of a jury, that jury's verdict must be set aside.

Both by statute and by the uncontradicted facts, Kawakita, a Japanese citizen owed allegiance to Japan.

He also was either presumptively expatriated during the period of time, or actually expatriated during the period of time involved in the indictment, and therefore under no theory whatsoever could he be guilty of treason. By international law and treaty prisoner of war camps were authorized to work former soldiers as labor battalions and to punish those who committed crimes or disobeyed the order.

In setting up the factual statement and the overt acts, respondent has, also, merely set out the evidence on direct examination. Much of this was shattered, or contradicted, on cross-examination, or the witness was shown to be incompetent, or insane.

Take, for instance, the case of Frank Mino, when one reads his direct testimony (Volume 2, Appendix C-5, page 23) one has one picture; but when one finishes reading his cross-examination, one realizes that we have the psychopathic statement of an insane man.

Examining all of the direct testimony alone makes the statement vague, uncertain, shifting and changing, with no two witnesses agreeing as to the time, place or circumstances of any of the alleged occurrences. This is not the type of testimony that could stand up in a death penalty case, nor that should support any death penalty verdict or any verdict in the criminal case.

Our Statement of Facts is a full and correct statement of facts. The trial is unusual in that most of the facts were uncontradicted except in the area of the

actual beating or striking or punishing any prisoners of war for the alleged purposes set out in the indictment, all of which appellant denied most vigorously.

In considering the facts, the court considers not only the facts presented on direct evidence but on cross-examination of the Government's Witnesses and the defense may rely on such facts. The Government has omitted the testimony on cross-examination in its *factual summary*, and in its appendix and thus has presented a misleading picture of the facts. But, where the facts are uncontradicted and stand undenied then an issue of law arises as to whether under those facts the case of treason is made out.

Cramer v. United States, 325 U. S. 1.

EFFECT OF TREATY REGARDING PRISONERS OF WAR

What the respondent has done in his brief is that he has failed in his Statement of Facts, as well as in his presentation, to consider and set out that the United States of America had a treaty with Japan, pursuant to the terms of the Hague Convention regarding the treatment and care of prisoners of war. This treaty, pursuant to the Constitution of the United States, constituted the Supreme Law of the Land and is a limitation upon Title 18, Section I, defining the crime and punishment for treason.

By the terms of this treaty and its operation, there can be no treason in a prisoner of war camp operated by a foreign power under the Rules and Regulations governing such prisoner of war camps and under the terms of the treaty thereof.

Otherwise, every prisoner of war who lifted a rock, or ran a train, or grew any vegetables would be guilty in a broad sense of treason for "giving aid and comfort" because he was doing some work for the enemy.

But, all of this was and is authorized by the Hague Convention and working in a prisoner of war camp as an interpreter thereof, requiring the men to perform the work they were required to perform, could in no sense be acts of treason. Nor, does the indictment itself charge that these are acts of treason. It is implicit

in the indictment itself that working as an interpreter in the P. O. W. camp is not charged as "treason"; but only allegedly the doing of his work in efficient or more than efficient manner charged as treasonable.

Thus, overt act (a) does not charge Kawakita committed treason by acting as an interpreter, or because he ordered a man to work who was not working; but because he allegedly came up and "told Toland to get to work and kicked him." When Toland stated he was sick, Kawakita replied "that is no excuse." And, in overt act (b) it is not alleged that the punishing of Grant for stealing from the Red Cross store room was treasonable, or that it was not permitted under International Law to punish Grant for the serious crime of the theft of scarce articles, and cigarettes; but only that the appellant assisted the Japanese Military Guards in carrying out their punishment in a form which was not to the liking of the pleader. But such type of punishment does not convert the non-treasonable act into treason. In overt act (c), it is not contended that it was improper to punish the prisoners of war for cutting up government property; the objection is to the manner of punishment. The same may be said of all the other overt acts. Each of them is lacking in treasonable quality and characteristics.

THE FOLLOWING FACTS ARE UNDISPUTED:

I.

That Camp Oeyama, the prisoner of war camp, was operated pursuant to International Law and the treaty of the United States with Japan, entered by an exchange of telegrams between the United States and Japan. (See Exhibit CW-CT and CC and page 2 et. seq. of Appellant's Opening Brief) and that the treatment of prisoners of war and their conduct was operated pursuant to this treaty, which is the Supreme Law of the Land.

The appellee ignores entirely this treaty arrangement with Japan and the right under International Law to maintain prisoner of war camps to utilize the labor of prisoners of war, and that "Article 4. Prisoners of war are in the power of the hostile Government". and "Article 8. Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State in whose power they are. Any act of insubordination justifies the adoption towards them of such measures of severity as may be considered necessary."

It is the appellant's position that since prisoner of war camps are authorized by International Law and Treaty and are the Supreme Law of the Land that one working in a prisoner of war camp, for the job for which he has been drafted by the foreign government, cannot be guilty of treason either in the performance of such

duties or in performing them in excess of zeal in the performance of such duties, and that working in such capacity does not make treason, nor the performance of assistance to those in charge of such capacity cannot constitute treason.

Nor do we construe the Government to claim in either its indictment or in the evidence that *working* as an interpreter in a prisoner of war camp of itself constituted treason. The Government's position seems to be that because it is alleged that the prisoners of war being Americans were ordered to work when they were not working—although they were required to work——constituted an excess of zeal which made the otherwise legal act treasonable, or that assisting the military personnel in carrying out the punishment for acts of insubordination, theft and dishonesty and destruction of government property in a manner in which these military authorities were carrying it out constituted treason.

It is not contended that punishment for theft was not authorized nor is it contended that punishment for cutting up government property was not authorized, nor that punishment for disobedience for subordination was not authorized. It seems to be the Government's position that the manner of carrying out this punishment made the otherwise authorized act under International Law "Treasonable." In this respect the Government has sought to convert what otherwise might be designated as a *War Crime* into *Treason*.

We do not mean to say by this argument that the acts charged were sufficiently proved by two witnesses, or established at all, or that the character of the testimony was such as to be worthy of credence and sufficiently substantial to establish the acts; but we do maintain that even if it was it could in no sense be treasonable because of the argument hereinabove presented. This argument has not been met in any wise by the Government. It has chosen to ignore entirely the Treaty arrangement between the United States and Japan, and the lawfulness of prisoners of war camps. When we start with this premise and with the applicable law pertaining thereto, we can well understand the appellant's position, namely that:

(1) The indictment fails to state an offense against the laws of the United States because it merely charges that the acts alleged occurred in Japan in a prisoner of war camp, maintained by a then existing sovereign under International Law, for acts otherwise authorized but performed in excess of zeal or because the prisoners of war were allegedly in a weakened condition; (due to two years in the Philippines with which appellant had nothing to do, and their shortened food supply—brought on by our own victorious march).

(2) The evidence regarding the eight overt acts shows that these alleged acts, being performed, allegedly, in a prisoner of war camp in Japan in connection with the disarmed *labor* battalion which formerly consisted of members of the United States Armed Forces, but no longer were members

of the armed forces, could not in any wise be treasonable because of the very nature and quality of the acts and the place of their performance, to-wit, a prisoner of war camp operated pursuant to Treaty Series No. 539 between the United States and Japan, and that jurisdiction regarding these acts was purely local. If Kawakita did these acts (and these we most seriously deny) and was authorized to do them pursuant to the Treaty and the operation of prisoner of war camps, and its lawful regulations, he could not be guilty of treason because he did the things which were authorized by International Law. If the acts were unauthorized because of the manner of their performance or carrying out, then he was violating the laws of Japan and the Rules and Regulations of prisoner of war camps in Japan (a copy of which is in evidence in the case) and his acts could not be "aid and comfort" to the Japanese Government, whose own laws he was violating, in this event.

We pause here to point out that most of the prisoners of war in this camp had come from the Philippines, where they had suffered previous inadequate supply of food and had been ill, and were in a weakened condition when they arrived in Camp Oeyama. Their lack of nutrition and the condition of which the Government complained had been acquired by them long before they reached this camp, and long before they were assigned to duty in this camp. The Memorandum of Dr. Bleich shows this. Kawakita seems to be blamed by the appellee for a condition which the men had ac-

quired long before this time. He is being blamed for a condition which the Government knows—or ought to know—existed from previous treatment at the hands of Japanese Military from 1941 on, and the prisoners did not reach Camp Oeyama until 1944.

It is further the appellant's position that there could be neither "aid" or "comfort" to the enemy government under the charges against Kawakita in the prisoner of war camp.

"Aid and Comfort" has been defined in *United States v. Cramer*, 325 U. S. 1, as "aiding the enemy government win the war or the government of the United States to lose the war." This, too, is subject to the provisions of International agreement in the conduct of prisoner of war camps.

It is not contended by the government—as, indeed, it could not be in view of the treaty between the United States and other powers regarding the maintenance of prisoner of war camps—that Kawakita's working in the prisoner of war camp constituted treason. Indeed, the government made quite a point of the fact that Fujisawa, in the identical position of Kawakita and working as an interpreter, was not guilty of treason. It was the government's contention throughout the trial that because Kawakita allegedly did things which it claimed Fujisawa did not do—namely, caused a prisoner of war to work when he was not working, by kicking him, or because he ordered a man to carry two buckets of paint

instead of one, when two was required, or assisted the military, allegedly, in the punishments that they were carrying out—that this *excess* constituted treason.

It is our position that the camp was operated and the work was authorized and Kawakita was drafted for the work. Even if it be conceded for the sake of argument, that he did his work with more zeal than Fujisawa and assisted the Military, (which we deny), such “excess” could not convert an otherwise lawful act into an unlawful act nor could it make “aid and comfort” out of non-treasonable conduct, no matter whether it appeals to the popular imagination or the ex-soldier or not.

We re-state our position that treason could not be committed in a prisoner of war camp in a foreign land by one working in that camp as a draftee, acting under International Law and performing only acts therein with relation to the disarmed labor battalion then within the power of the hostile government and subject to all the laws, regulations and orders in force in the armies of the detaining power.

The Government’s brief speaks much of the conditions of the prisoners of war. (Appellee’s brief page 14). It is unfortunate that these men, most of whom were captured in Battan early in 1942 and had suffered from the inadequacies of the food in the Philippines for two years, were suffering from Beri-Beri and slowly starving to death, aided largely by the American

encirclement of Japan so that a terrific food shortage was caused not only for the military but for the civilian population (see Defendant's Exhibit on Exchanges of Telegrams of the State Department); but this seems to blame the whole condition on poor little Kawakita, a young drafted interpreter—who could not change the lot of the men if he wished—and who was unfortunate to be found in the United States of America after the war and had about as little to do with the unfortunate physical condition of the American ex-soldiers as any individual in Japan, and was unfortunate enough to be spotted in the United States of America, by an ex-prisoner of war who wanted to kill him when he saw Kawakita in the United States.

The Government's Brief ignores entirely the Treaty arrangement regarding prisoners of war, and nowhere even mentions or discusses this feature which we set out at length in our Opening Brief. The Government did not even give any of the Statutes or Regulations regarding prisoner of war camps.

It is our position that Kawakita—drafted by the Japanese Government to act as an interpreter in the prisoner of war camp—gave no aid and comfort by such employment to the Japanese government in any of the overt acts found by the jury, both by International Law and Treaty; his work in such capacity was authorized; he was compelled by law to perform the work, and none of the acts could, therefore, contain any intentional, wilful, unlawful or felonious acts on his part,

nor any treasonable intent to betray the United States of America in the performance thereof. Nor, could there be inherent in such acts any character or quality of the definition of treason—a betrayal of one government to the forces of another government.

II.

The second undisputed fact contained in the court's instructions to the jury is: THAT KAWAKITA WAS AT ALL TIMES A CITIZEN OF JAPAN, AND THAT HE WAS RESIDING IN JAPAN AND WAS RECOGNIZED BY THE JAPANESE GOVERNMENT BY ALL OF ITS ACTS AS BEING JAPANESE.

This concession by the Government—in fact this instruction by the court—necessarily removes Kawakita from any possibility of being guilty of treason. As a Japanese citizen, he owed 100% allegiance to the government of Japan while residing in Japan.

Conversely and correctly we held that Japanese residing in the United States owed one hundred percent allegiance to the United States otherwise we would not have drafted them into selective service. *Okamoto v. U. S.*, 152 Fed. (2) 905; *Talaguma v. U. S.*, 156 Fed. (2) 437; *Fujii v. U. S.*, 148 Fed. (2) 298.

The doctrine now advocated by the government is the doctrine of the totalitarian governments that a

person born in their country is always a citizen of that country, and no matter where he lives nor what citizenship he takes on he still owes allegiance to the country of his birth. This was the doctrine of Germany; this was the doctrine of Russia, and of Japan. It was disavowed by the United States, by Attorney General Black in 1859. Since that time, our policy has been consistently and constantly against this totalitarian doctrine now attempted to be placed in force by the Government in this case. As the result of this announced policy by the Attorney General, Title 8, Section 800, called the Right of Expatriation, was adopted. (See Appellant's Opening Brief, Appendix, page 10).

This section disavows the right of any foreign state to claim allegiance of a citizen of the United States while residing in the United States, or to impair the citizenship of one living in the United States because he was born in a foreign country, or because that foreign country claims that he still owes allegiance to that country and is subject to its laws and its drafts because he was born in that country. This is the identical claim made by the government of the United States in the instant case. It asserts that because Kawakita was born in the United States he owes allegiance to the United States, even though he is living in Japan, and is a citizen of that country when that country is at war with us.

But, his allegiance to Japan by reason of his Japanese citizenship and while residing there had to be of necessity 100% allegiance.

Luria v. United States, 231 U. S. 9, 28;
Murray v. The Charming Betsy, 6 U. S. (2d
 Cranch) 64, 122 L. Ed. 208;
Wong Kim Ark, 169 U. S. 649, 42 L. Ed. 890;
Carlisle v. United States, 83 U. S. (16 Wall.)
 147, 154, 21 L. Ed. 426;
Oyama v. California, 332 U. S. 633, 666;
Fujii v. United States, 148 F. (2) 298.

III.

Another undisputed fact in the case is: THAT KAWA-KITA WAS A DUAL CITIZEN

That such dual-citizenship is recognized not only by the United States by its State Department (See *Perkins v. Elg*, 307 U. S. 325) but that as such dual-citizen he was residing in Japan and, therefore, owed paramount allegiance to the country of his residence and of which he was already a citizen.

The government brushes off this matter lightly. (See Appellee's Brief, pages 89-90).

The doctrine therein enunciated by the government is not the policy of the State Department nor of the United States of America, nor is it the policy set out by Statute in the Nationality Act of 1940 itself, which makes certain provisions for dual citizens, thus recognizing that dual citizens have paramount obligation to the country of their residence and of their other citizenship.

The government chooses to ignore entirely the State Department Bulletin and policy regarding dual-citizenship. (See Appendix to Appellant's Opening Brief, page 15, containing the Bulletin of the State Department; also see Code of Federal Regulations regarding Dual Allegiance set out in Appendix, page 16, Opening Brief.)

The State Department itself not only recognizes dual-citizenship but has instructed all its consultate agencies, while a person who has dual nationality resides in the United States, the right of the United States to his allegiance is paramount to the right of the other country of which he may be a citizen, and while a person who has dual allegiance is residing abroad in a country of his citizenship he owes allegiance to that country paramount to that of the United States. The meaning of the word "paramount" has been defined by the Supreme Court of the United States in the Water Litigation with the State of California and in which case the Supreme Court has held that the *paramount* obligation to the United States means "total obligation to the United States."

United States v. California, 332 U. S. 19, 91 L. Ed. 1889.

In that case the word "paramount" was held to mean "absolute right in the United States towards all other claims, although the State claimed certain qualified rights." Otherwise, the paramount obligation of a

dual-citizen is defined and set out by the State Department is *the country of his residence*. This is so under International Law and the Law of Nations.

The Government overlooks completely the Treaty with Japan regarding prisoners of war camps on the question of "aid and comfort" as shown by its argument on pages 69-71 of its brief. There the government says:

"While employed to perform solely the duties of interpreting, and knowing that he had authority from his employers and the Japanese military to do nothing *more* than interpret, he roamed the factory, mine and camp at Oeyama, wielding a wooden sword and using his fists to execute a campaign to extract from his fellow Americans the last mortal ounce of exertion in furtherance of munitions production for the Japanese war machine. This goes far beyond the minimum requirement for the giving of aid and comfort, as a matter of law."

Thereafter, it quoted a charge to the grand jury given in 1861 in the District Court of Ohio regarding aid and comfort.

But, this statement is not only a misstatement of the evidence but an attempt to import something into the case which was not there, and overlooks completely the fact that the treaty with Japan permits the establishment of war camps to do work in a foreign nation and, whether digging the earth by means of a shovel for the purpose of finding ore is authorized, the work was not

for Kawakita to determine. It was Sgt. Montgomery who told of the work in the mine, which he said consisted of digging in the dirt by means of a shovel.

This was certainly the type of "aid and comfort" which could not be in any sense treason under International Treaty. If it was treason, then every disarmed soldier who had become a part of the labor battalion and was no longer a soldier would be guilty of giving "aid and comfort" to Japan and if he refused even though he might be shot. Also, Dr. Bleich was guilty of giving "aid and comfort" to Japan because he treated the sick and replaced a Japanese doctor in treating even members of the Japanese armed forces, or their wives if they became ill. But such did not constitute "aid and comfort" as defined by Mr. Justice Jackson in *Cramer v. United States*, 325 U. S. 1.

And, if it was not "aid and comfort" to act as interpreter, to act in any capacity in this work could not be "aid and comfort" to require the men to work who were not working, pursuant to the International Agreement. Of course, it is a complete misstatement of the evidence to say that Kawakita "used his fists to execute a campaign to extract from his fellow Americans the last mortal ounce of exertion in furtherance of munitions production for the Japanese war machine."

In only two of the eight overt acts found by the jury was there any question of doing additional work, neither involved "munition production."

OVERT ACTS

“In Overt Act (a) Toland had stopped working altogether and was doing nothing when he, allegedly, was told he had to work, and allegedly was kicked. (See Summary Appellant’s Appendix, page 26.)

In Overt Act (j) John J. Armellino was only carrying one paint bucket when he was supposed to carry two paint buckets and the defendant ordered him to carry the two paint buckets, and allegedly struck Armellino. (See Appendix, pages 50-51, R. Tr. 1218 et seq.)

None of the overt acts, including these, show any effort to “extract from his fellow American the last mortal ounce of exertion in furtherance of munitions production for the Japanese war machine.”

One of the other overt acts related solely to getting a prisoner of war back to the camp three hours earlier than he got back, after injury. And the other five overt acts related solely to allegedly assisting the military in punishing prisoners of war for crimes and violations of regulations they committed in the camp. Thus, within a period of a year covered by the indictment the government was able to produce evidence that on one occasion Kawakita kicked one man who wasn’t working, and on another occasion he struck a man who was carrying only one paint bucket instead of two.

If the government should conclude from such frail evidence that "Kawakita hounded, beat, threatened, cursed and drove the American prisoners of war to greater production of nickel ore to be delivered under war contracts to the Japanese government," such a broad misstatement of the evidence can only be attributed to blind ignorance of the facts or patriotic fervor.

Such alleged facts, if deemed proved, were not aid and comfort to the government of Japan.

Surely they did not help Japan toward winning the war or the United States to lose the war. (*Cramer v. U. S.*, 325 U. S. 1.)

These overt acts are, in relation to the high crime of treason, ridiculously insignificant.

Here they deal with acts that are "trivial and commonplace;"

Cramer v. United States, 325 U. S. 1, 35.

His work in the prisoner of war camp, his enforcing discipline therein were acts which are authorized under treaty agreements with Japan.

In *United States v. Stephan*, 50 Fed. Supp. 738, 745, approved in *Stephan v. United States*, 133 Fed. (2d) 87, cert. denied 319 U. S. 781:

"Our forefathers did not want Congress to be able to take spitting in somebody's face, or any-

thing of that kind, as being treason so they tell the Congress itself what it is.”

The government certainly was hard put to it, when they had to claim that these two alleged overt acts (thoroughly denied by the defendant and shown to be inconsistent from the government's own proof as to time, place and circumstance) during the period of a whole year of appellant's alleged activity in this camp, to charge treason.

Surely this proves that the defendant was being prosecuted merely because he came back to the United States, and to make a hoop-la for the United States War Veterans.

May we not call a spade a spade and this treason trial a travesty on justice?

As the government has not followed our order in the reply brief but has set up its own categories and its own targets to shoot at, we have likewise found it difficult to reply in the order in which the government has set out the points, as it has taken the less significant matters first and omitted some of the most important matters. It has also quoted only the direct testimony of witnesses and omitted the shocking battering of the cross-examination, which destroyed the effect of the direct testimony such as it was.

But, even taking its own order of proof on the main issues of treason itself, we find nowhere does the government set out that each of the overt acts were proved

by sufficient, substantial and concrete evidence of two witnesses to each of the *same* overt acts at the same time, place and circumstances. In our Opening Brief, we set out a complete summary of all of the substantial evidence as to each overt act, showing uncertainty, unlike, and divert remarks as to time, place and circumstances, of the court and which are insufficient to prove the overt acts by the credible testimony of two witnesses, as to each overt act. Although appellee purports to discuss this subject under Title VII, page 104 et seq. of his brief, we find nowhere therein, however, any remarks pointing out specifically, that any two witnesses testified by direct testimony to the identical overt act as found by the jury. Whereas Toland put a cross on a map as to a place where he said it occurred and set out that the event occurred in June. (Summary, Appellant's Brief, appendix 26), no specific date is given. The other witnesses all placed the time at different months and different periods and different places. This is not direct testimony of an eye-witness as to an exact time and place. By his testimony, Toland himself has elected the date and time and exact place on the map. The other witnesses were bound to conform exactly or there was not two eye-witnesses to the identical act at the identical time and place.

People v. Waits, 18 Cal. App. (2d) 20;
See *People v. Morris*, 3 Cal. App. 1.

Likewise, the first witness to each of the occurrences by the eye-witnesses, we deem to be an election of the designated time, place and circumstances of the occurrences, yet none of the other witnesses fixed the identical occurrence at the identical time or place. We respectfully submit that the constitutional requirement has not been met, nor has the government met our position in its argument. The jury cannot arbitrarily disregard the evidence and make a finding by reason of patriotism, surmise and conjecture. The evidence must be most exact and explicit, and the court in reviewing the most serious charge must review the evidence to determine such facts.

We think that the evidence shows further:

(1) That during the period specified in the indictment, the appellant was a Japanese citizen (which was the instruction of the court itself) owing allegiance, therefore, to the government of Japan in an area of 100% allegiance—not a divided allegiance or partial allegiance—while living in Japan.

(2) That while the appellant was a Japanese citizen, owing allegiance to the Government of Japan, he adhered to the government of Japan which, although an enemy of the United States, was not an enemy of the defendant; nor was he a part of the enemy country, nor did he become drafted in the services of Japan and work with intent to betray the United States, as charged in

the indictment. He was faced with the contingency of either obeying the draft and performing the duties assigned to him, or to be shot.

(3) That the overt acts were not proved to have been committed as charged in the indictment.

(4) That there was no "aid and comfort" to the Government of Japan as those words are charged. He did not aid Japan in winning the war, intending to win the war, nor in helping the United States to lose the war. As the court once aptly remarked during the trial, the United States won the war—Japan lost the war. This is not the kind of conduct which was meant by the meaning of the words "to give aid and comfort" in the Constitutional definition.

(5) That there was no intent to betray the United States.

To hold that he intended to betray the United States by such conduct is to distort the ordinary meaning of the word "betray"; to give it a strained construction not contained in that word.

THE LAW OF NATIONALITY AND EXPATRIATION

**Under this heading the government concedes, as it must:
THAT IF KAWAKITA WAS EITHER NOT A
CITIZEN OF THE UNITED STATES, OR WAS
NOT A PERSON OWING ALLEGIANCE TO THE
UNITED STATES, HE WOULD NOT BE GUILTY
OF TREASON.**

The government ignores the undisputed evidence to say that the jury having found against him was sufficient.

Where the facts, as here, are undisputed and not in contradiction the question is purely one of law which must be decided by the court.

It is undisputed, and the court so instructed the jury, that Kawakita was at all times a citizen of Japan, owing allegiance to Japan. But, the court also instructed the jury, in contradiction to this instruction, that this did not make any difference—that he still owed us allegiance. The question is, was he owing allegiance to the United States?

But, we again assert that Kawakita was a Japanese citizen owing allegiance to Japan, and as such it was a part of his duty to Japan to give his loyalty entirely to that country, while residing therein. It was his paramount obligation, recognized by our State Department and so proclaimed to the world. He, therefore,

was not a person owing allegiance to the United States at any time mentioned in the indictment. This is a pure question of law on the undisputed facts of the case, and the finding of the jury is of no concern and is an arbitrary disregard of this pure question of law.

The Government contends incorrectly in its brief that loss of nationality is governed exclusively by the Nationality Act of 1940. We have set out in our opening brief, the history of the Nationality Act of 1940, and the Legislative history shows that the Act of 1940 was not meant to be the exclusive means of losing nationality, however.

It is appellant's position that Kawakita being a Japanese citizen did not have to do anything set out in (b), (c), (d), (e), (f) or (g) to become a Japanese citizen. He already was a Japanese citizen owing allegiance to Japan.

But, if he was required to do any one of the acts set out in (b), (c), (d), (e), (f) or (g) of the Nationality Act, he complied with several of those sub-sections;

For instance, (b) "Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state," Kawakita's entry of his name in the Koseki (the formal family register) as a citizen of Japan constituted a formal declaration of allegiance to Japan. Likewise, his having daily pledged his allegiance to the Emperor of Japan in this war factory

constituted such an affirmation and declaration of allegiance.

As to (c), "Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he *has* or acquires the nationality of such foreign state," Kawakita had the nationality of Japan and his serving in a prisoner of war camp as an interpreter was such a participation in and with the armed forces of Japan as to constitute compliance with sub-section (c) as a matter of law.

As to (d), "Accepting, or performing the duties of, any office, post, or *employment* under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible," it appears from the uncontradicted testimony that the company was in the employment and it is so contended by the government that the company was working under the government of Japan. Kawakita accepted and performed the duties in and connected with that employment, and the evidence is uncontradicted that only nationals of Japan were eligible for such employment.

But, we take the position that Kawakita, being already a Japanese citizen, did not have to do any of these acts. The only section that applies to Kawakita is section (a) of the Nationality Act, which gives him an opportunity to elect his citizenship at the age of 23 by expatriating himself as an American citizen "by his own voluntary act" or "by failing to return to the

United States within two years and taking up permanent residence in the United States.”

The main and the only question in connection with the defendant's nationality, under the Nationality Act of 1940 or under International Law is whether the United States under the Nationality Act of 1940 or by International Law recognizes “dual citizenship” or not.

If it does recognize such dual citizenship, then it does recognize that the defendant was a Japanese owing allegiance to Japan. The Government stipulated and the trial court gave instruction to that effect during the defendant's trial.

If the law and the Government recognize that the defendant had dual citizenship during 1944 and 1945, then the defendant cannot be guilty of treason as charged. And as a matter of law, the Government is estopped from charging the defendant of the treason.

Japan was not an enemy state so far as the defendant is concerned; giving “aid and comfort” to Japan by Tomoya were parts of his duties to Japan as a citizen of Japan.

The right of election theory is not based on the Yasui case alone as claimed by the Government (see page 97) but decisions in *Petition of Doyle*, 293 N. W. 614, and in *Haaland v. Attorney General*, 42 F. Supp. 13, and *Perkins v. Elg*, 59 S. Ct. 884, equally held that “if a child born in the United States is taken during

minority to the country of its parents' origin where its parents resume their former allegiance, the child does not thereby lose his citizenship in United States, provided that on attaining majority he elects to retain that citizenship and to return to United States to resume his duties, . . . ”

Under the decisions, such a person must elect, upon attaining his majority, whether he would accept citizenship in the United States or give his allegiance to the emperor of Japan.

The election is mental act which can be discovered by a tribunal as can criminal intent, knowledge or any other mental state, and “such a mental state may be found in a criminal case contrary to the sworn evidence, protestations, and declarations of a defendant.”

Yasui v. U. S., 48 Fed. Sup. 40.

The Government's contention that “His so-called ‘election’ is of no significance.” He was already, under the law of Japan a Japanese citizen.

That is to say, under Japanese law, the fact of his birth to Japanese parents resulted in a claim by the Japanese government of him as a citizen. His ‘election’ did not alter the fact of his birth to Japanese parents, nor did it alter the basis on which Japan asserted its claim to him as a citizen,” is out of reason because (1) the ‘election’ as used in the defendant's brief does not mean “obtaining”; (2) because the defendant who was born in the United States and who was taken to

Japan while in minority, had right of election as to his citizenship—whether he shall retain his American citizenship or give his allegiance to Japan—when he arrived at his majority; (3) because the defendant had two citizenships—American and Japanese—and for that reason there can be an “election.” That is to say, that, if one has only one citizenship, there cannot be “election” under Subsection (a) of the Nationality Act of 1940.

3. The government acknowledged the fact that the defendant intended to be a Japanese, that is, the fact that he elected to be a Japanese rather than an American citizen. At page 75 of the Government brief there are the followings:

“Kawakita’s intent was fully proven by evidence of the environment in which he acted; it was fully proven by evidence of the interchange between him and the prisoners of war. The ‘give and take of the situation’ appears strikingly from the record almost in its entirety.

“Kawakita’s intent to be disloyal to the United States and at the same time be loyal to the government of Japan is proven by his own direct testimony.”

And again at page 93:

“There was before the jury the testimony of Kawakita that he entered his name in a document known as a Koseki Tohon, or family register, and that he thereby intended to be a Japanese.”

4. The Government contends that (see page 92 of the Government's brief):

"The Congress by enacting the provisions of the Nationality Act of 1940 intended to clarify the law as to dual nationals by specifying a definite method of terminating the dual citizenship and of electing exclusive United States Nationality."

A first question in connection with the foregoing paragraph is *which part of the said Nationality Act does provide such a definite method of terminating dual citizenship and of electing exclusive United States nationality?*

The subsection (b) thereof does not necessarily apply to a person who has dual citizenship only;

Subsections (c), (d), (e), (f) are applicable to an American citizen who gives his allegiance to a *foreign state*; serves in the armed force of a *foreign state*; perform the duties of any office, etc., of a *foreign state*; votes in a political election in a *foreign state*; or makes a formal renunciation of nationality before a diplomatic . . . officer of the United States *in a foreign state*. That is to say, that such an act on the part of an American citizen should have been done in a foreign state in order to lose his American nationality. If one has a citizenship in that particular "foreign state" then that country is not a foreign state to him. It is his country. Therefore, Subsections (b), (d), (e) and (f) are not applicable or are not intended to apply to

an American citizen who has dual citizenship, but only subsections (a) and (c).

Subsections (g), (h), (i) and (j) are not pertinent in the matter.

Then and in that event, which portion of the Nationality Act does apply to dual citizenship? The only portion which provides anything about a person who has dual citizenship is the subsection (a) thereof and (c). The subsection (a) provides a definite method of terminating dual citizenship and of electing United States nationality as contended by the Government. Subsection (c) applies to dual citizens who go into the armed forces in the country of their other citizenship.

Thus, while the Government insists that: "His so-called 'election' is of no significance. He was already, under the law of Japan a Japanese citizen" (see page 94 of the Government's brief); that the Yasui case is not applicable to the defendant (see page 97 of the brief); and that "The exclusive means of losing nationality" are (1) Taking an oath . . . of allegiance to a foreign state; (2) entering . . . in the armed force of a foreign state . . . ; and (3) accepting or performing the duties of any office . . . of a foreign state . . . for which only nationals thereof are eligible; it admits a definite method of terminating dual citizenship and of electing exclusive United States nationality is provided in subsection (a) thereof

and (c) thereof by becoming connected with the armed forces. We think working in a P. O. W. camp under army jurisdiction is such a connection.

The subsection (a) provides among others that . . . to return to the United States and take up permanent residence therein, and it shall be thereafter deemed that *he has elected to be an American citizen*. Failure on the part of such person to so return and take up permanent residence in the United States during such period shall be deemed to be determination on the part of such person to discontinue his status as an American citizen, and such person shall be forever estopped by such failure from thereafter claiming such American citizenship; in other words, in case of a child or minor who has dual citizenship and who resides in that particular country in which he has also a citizenship besides his American nationality, must return to the *United States before he shall have attained the age of 23 years*; or in case of adult at the time the Act took effect, he must return to the United States within two years from the effective date of the Act. And failure to so return to the United States on such persons (who have dual citizenship, but not any other American citizens) shall be deemed that such persons have "elected" not to be American citizens. The word, "elected" is to be applied either way under the subsection (a) thereof.

ELECTION OF CITIZENSHIP BY A PERSON WHO HAS SO-CALLED DUAL CITIZENSHIP

In *U. S. v. Minoru Yasui*, 48 F. Supp. 40, the court said as follows:

“A person by virtue of his birth in the territorial limits of the United States and notwithstanding the fact that his parents were alien Japanese incapable of naturalization in the United States had under the Constitution conferred upon him the right of citizenship,

“But by international law *he was also a ‘citizen’ of Japan, and had upon attaining majority, the right of ELECTION as to whether he would accept citizenship in the United States or give his allegiance to the Emperor of Japan.*

“The ELECTION upon attaining majority, by persons born of alien Japanese parents, incapable of naturalization in the United States, whether he would accept citizenship in the United States or give his allegiance to the Emperor of Japan *IS A MENTAL ACT WHICH can be discovered by a tribunal as can criminal intent, knowledge or any other mental state*, and such a mental state may be found in a criminal case contrary to the sworn evidence, protestations, and declarations of a defendant.”

“ . . .

“That a person born in the United States of alien Japanese parents, *after his majority, continued to reside in the United States was a circum-*

stance which raised an inference that he intended to claim citizenship in the United States."

(The above is quoted from
"GENERAL DIGEST" page 329)

"In the absence of a treaty or statute to the contrary, a minor child who is a citizen of the United States by municipal law *acquires a dual nationality when taken by its parents to a country under the laws of which the child is deemed a citizen*, and the child's United States citizenship is not lost *unless, on attaining majority, the child either fails to elect to retain that citizenship and return to the United States to assume his duties or voluntarily renounces or abandons his United States nationality and allegiance.*"—*Petition of Doyle*, 293 N. W. 614. (General Digest 12, p. 339.)

RIGHT OF ELECTION

"If a child born in the United States is taken during minority to the country of its parents' origin where its parents resume their former allegiance, the child does not thereby lose his citizenship in United States, provided that *on attaining majority he elects to retain that citizenship and to return to United States to resume his duties*, . . . " *Haaland v. Attorney General of U. S.*, 42 F. Supp. 13.

"A child born in the United States and taken during minority to the country of his parents' origin, where his parents resume their former

allegiance, does not thereby lose his citizenship in the United States, provided that *on attaining majority he elects* to retain that citizenship and to return to the United States to assume its duties.” *Perkins v. Elg*, 59 S. Ct. 884 (see 8 General Digest, p. 395).

A PERSON WHO HAS A DUAL CITIZENSHIP HAS THE RIGHT OF ELECTION TO ACCEPT ONE CITIZENSHIP AND ABANDON THE OTHER.

The authorities quoted in the foregoing two pages clearly show that Tomoya Kawakita did not have to “obtain naturalization in a foreign state, either upon his own application or through the naturalization of a parent having legal custody of such person” to lose his citizenship in the United States.

Tomoya Kawakita had the right of election to accept the Japanese citizenship and abandon his American citizenship and the ELECTION is a mental act which can be discovered as can any other intent and mental state, and is established or corroborated by physical acts or documents to each.

1. *The fact that he, after his majority, continued to reside in Japan and failed to return to the United States to assume his duties;*
2. *The fact that he, after his majority, failed to return to the United States and take up permanent residence therein within two years from the effective date of “this chapter”;*

3. *The fact that he, after attaining the age of 23 years, continued to reside in Japan without acquiring permanent residence in the United States;*
4. *The fact that he, after attaining his majority under Law of Japan, caused his name to be registered in his uncle's FAMILY REGISTER RECORD in the Registrar's Office in the City of Suzuka to revive and resume his dormant Japanese nationality conferred upon his birth and to reaffirm allegiance to Japan;*
5. *The fact that he, after the registration in said Family Register, caused Tokyo Mejiro Police Office which had him under its supervision since the war started, to lift all restrictions against him (as an alien American citizen);*
6. *The fact that he, after said registration, applied for a job with a copy of said Family Register Record which showed that he was then a full-fledged Japanese at the Tokyo office of the Oyeyama mine;*
7. *The fact that he, after said registration, was drafted under Personal Service Draft Act which was applicable to Japanese nationals only and assigned to the said Oyeyama mine;*
8. *Passport: The fact that Tomoya went to China with a Japanese passport.*
9. *The very facts charged in the indictment that he gave "aid and comfort" to Japan during the period specified in the indictment and gave his allegiance to the Emperor of Japan;*

10. *The fact that his said registration in the Family Register Record was voluntary submission to all duties of the Japanese subjects including military services and such an act was in effect the taking of an "oath" of allegiance to Japan; (In Japan all males whose names were registered in the Family Register Record and over the age of 20, were subjected to the military services. And particularly so in time of war. If any men whose names were not registered in the Family Register Record in 1943, 1944 and 1945, registered his name in said Family Register, he in effect submitted himself to military service.)*

See *Savorgnan v. U. S.*, 94 L. Ed. (Adv. 206, 208).

In *De Cicco v. Longo*, 46 F. Supp. 170, the court ruled that such "voluntary submission to military service was in effect the taking of an oath of allegiance to Italy in 1915 *within the meaning of the Citizenship Act of 1907 that American citizenship should be lost by taking an oath of allegiance to a foreign country.*"

All of the above mentioned facts were circumstances which showed that Tomoya Kawakita exercised his right of ELECTION to be a Japanese citizen and determinations to discontinue American citizenship.

Savorgnan v. U. S., 94 L. Ed. 203, 206-8.

The determination as to whether Kawakita made an election while in Japan was a subject for that government's decision under International Law that government recognized that Kawakita elected Japanese Nationality. It gave him the freedom of the country by removing previous "alien" restrictions. It required of him the duties of its citizens as a draftee and gave him its benefits of protection in a Japanese passport to go to China and a ration card of the type given to its citizens. By International Law and our own declared policy Japan's determination is binding on us.

THE MOST IMPORTANT QUESTION IS WHETHER OR NOT TOMOYA KAWAKITA HAD A DUAL CITIZENSHIP UNDER THE RULINGS OF THE YASUI CASE.

If he had the dual citizenship, there can not be any treason charges against him under the circumstances; but if he did not have dual citizenship at any time during his stay in Japan, theoretically or otherwise, the Government of the United States might properly charge him with treason if he had only the citizenship of the United States.

Kawakita's Japanese Nationality

1. Tomoya Kawakita re-affirmed Japanese nationality under the Japanese Nationality Act, as interpreted by Japanese Attorney General, Yoshio Suzuki.

2. Tomoya Kawakita caused his name to be registered in a FAMILY REGISTER RECORD on March 8, 1943, upon his own free will. And such act was deemed to be an act of reaffirmation of allegiance to Japan, according to said Yoshio Suzuki, attorney general of Japan.
3. Tomoya Kawakita ELECTED to give his allegiance to Japan and abandon his American citizenship on the 8th day of March, 1943, by registering his name in Family Register Record and thereafter by residing in Japan without acquiring permanent residence in the United States.
4. All other acts performed by Tomoya Kawakita during 1944, 1945, including acts enumerated in the indictment, and other circumstances were evidences that he elected to be a Japanese and abandoned his American citizenship under the ruling of the Yasui case.

THE NATIONALITY ACT OF 1940 MAKES DISTINCTIONS BETWEEN AN AMERICAN CITIZEN WHO HAS NO DUAL CITIZENSHIP AND ONE WHO HAS A DUAL CITIZENSHIP.

1. While an American citizen may reside in a foreign country after he has attained the age of 23 years without acquiring permanent residence in the United States and *retain that citizenship*, if he does not have citizenship in that particular foreign country, those who have citizenship in that foreign country *can not retain* their American citizenship if they reside therein after they have attained the age of 23 years without acquiring permanent residence in the United States.

The above mentioned DISTINCTION should be taken into consideration when one tries to understand the meaning of the law. And furthermore, the words, such as "ELECTED" and "*SHALL BE DEEMED TO BE A DETERMINATION*," should not be passed upon lightly. That means that:

- a. The 1940 Nationality Act itself give *the right of ELECTION* to a person who has a dual citizenship;
- b. *The law itself gives right to determine which citizenship he shall retain.*

The trial court failed to give an instruction concerning such "DISTINCTION" which was one of the

most important points in this case. That is, the court failed to give an instruction to the effect that the defendant had the right of ELECTION between the two citizenships, that the defendant, if voluntarily resided in Japan after he attained the age of 23 years, shall lose his American citizenship, and that such ELECTION on the part of the defendant was mental act which can be discovered as can any other mental state.

1. *To obtain a Japanese nationality, by a person who has no dual citizenship or Japanese citizenship*

and

2. *To elect to be a Japanese national, by a person who has a dual citizenship,
Are two different things.*

1. To obtain a Japanese nationality by any person over the age of 21 years, means that he has to go through the procedures provided in the Japanese nationality law;
2. He may elect to be a Japanese citizen and abandon his other citizenship if he has a dual citizenship, like Tomoya Kawakita, by registering his name in some FAMILY REGISTER RECORD, if his name was not so registered, and (2) reside in Japan after he attained the age of 23 years. *To establish residence in Japan after he attained the age of 23 years* is one of the conditions to lose the American citizenship by a person like Tomoya Kawakita.

The fact that the defendant, Tomoya Kawakita, established residence and stayed in Japan long after he

attained the age of 23 years was a circumstance which raised an inference that he intended to claim citizenship in Japan. He did not have to obtain naturalization in Japan in order to lose his American citizenship. All he had to do for the purpose (losing his American citizenship) was to elect to be a Japanese citizen, and reside therein after he attained the age of 23 years.

In this connection, it should be noted that the trial court's instruction 11-G, stated: Our law *presumes* that such action, *VOLUNTARILY TAKEN*, evidences *an intent* to renounce or abandon allegiance to the United States, and with it of course American citizenship and all rights pertaining thereto," showing that, to be an American citizen or not to be, is a question of intent and in this case a question of ELECTION.

iance is determined by the laws of the country where he actually lives, and that he must respond fully to that allegiance. Thus, in the case of the *United States v. Austria & Hungary*, it was said:

“Citizenship is determined by rules prescribed by municipal law. Under the law of Austria, to which claimant had voluntarily subjected himself, he was an Austrian citizen. The Austrian and the Austria-Hungary authorities who are within their rights in dealing with him as such. Possessing as he did dual nationality, he voluntarily took the risk incident to residing in Austrian territory and subjecting himself to the duties and obligations of an Austrian citizen arising under the *municipal laws of Austria*.”

Hackworth, Volume 3, chapter 9, page 358.

And again, in reference to its dealings with France, the opinion of the Office of the Solicitor for the Department of State, February 23, 1910 (1910 Solicitor's Opinions, PT-1, p. 297) it was stated:

“In regard to the compulsory military service in the French Army of a minor born in the United States of French parents, the general rule seems to be that the liability of the child in the performance of the duties of allegiance is determined *by the laws of that one of the two countries in which he actually lives*. If by the law of that country he is considered as a citizen and if his parents have not renounced allegiance to that country it appears as the general rule that the country of his birth affords the child no protection during his minority.

It would, therefore, appear that the young German in your memorandum is liable to be drafted in the French army."

And, our country has taken the position with reference to dual citizens residing in the United States. Secretary Lansing said to Minister Eckengrin, No. 422, May 20, 1918, Memorandum Department of State, file 811. 2222-Haddon, Williams:

"In holding that persons born in the United States of Swedish parents were subject to military service in the United States, notwithstanding the fact that they might also have the nationality of their parents, the department of state said that 'the natural presumption would seem to be that by thus returning to this country on or shortly before reaching the age at which an election might legally be made and having since remained here several years, they intended to and did elect American citizenship.'"

Japanese citizens, although having elected Japanese nationality by residing in the United States were nevertheless subject to military service in the United States and for the United States and were subject to criminal punishment for failing to register and perform services required under the Selective Service Act.

Fujii v. U. S., 148 F. (2) 148 F. (2) 298.

Thus, dual citizenship as involved in this case is a two edged sword because if we proclaim that a dual citizen residing in the United States still owes allegiance to his other government, it is contrary to the an-

nounced policy which we have adopted and which has constantly been understood in International law and otherwise.

THE TRIAL COURT'S INSTRUCTION THEREFORE TO THE JURY THAT IT DID NOT MAKE ANY DIFFERENCE THAT KAWAKITA HAD JAPANESE NATIONALITY AND WAS RESIDING IN JAPAN, BUT THE QUESTION SOLELY WAS WHETHER HE WAS STILL AN AMERICAN CITIZEN, THEREFORE OWING ALLEGIANCE TO THE UNITED STATES misstated the law in respect to dual citizenship and ignored the duty of one having dual citizenship owing 100% allegiance to the country in which he was residing. To hold that such a dual citizen still had a duty of allegiance to a country in which he was not residing and which was giving him no protection whatsoever and could not give him any protection whatsoever is contrary to International Law and the Law of Nations as well as the Law of the United States.

The State Department over a number of years held in the cases of persons who were born in the United States of alien parents, and thus acquired American citizenship under Article 14 of the Amendment to the Constitution of the United States and likewise acquired the nationality of the state of which their parents were citizens or subjects under its laws, that if such persons were taken abroad during their minority, and resided in the country of which their parents were nationals, they were required to demonstrate their election of the

nationality of the United States after obtaining majority or otherwise are not held to be entitled to recognition as citizens of the United States. (The Department of State to the Consul General at London, November 30, 1936, M. S. Department of State, File 130, Vince L. M.)

In the case of *Perkins, Secretary of Labor, et al., v. Elg*, 307 U. S. 325, 327, 329, 343, the Supreme Court of the United States held that a child of a foreign born national who moved from this country during minority had the right to elect to retain the citizenship acquired by birth and to return here for that purpose. Implicit in that situation, therefore, is the right of election of the foreign nationality also.

The problem of dual nationality or dual citizenship and dual sovereignty within the states of the United States has even raised questions in our own state and nation. The right of the federal government as paramount to the state government has been the subject of water litigation, wherein the Supreme Court of the United States has held that the federal government's rights are paramount and supreme.

In *Gregg v. Winchester*, 173 Fed. (2d) 512, 513 the court discusses the "dual sovereignty recognized in our federal and state constitutions." There the court said:

"It is altogether a remarkable testimonial to the good sense of the American lawyer, both in his capacity as a judge and as an advocate that, sensing the malady as a serious one, he readily discov-

ered and applied the remedy. The remedy consisted merely of recognizing *exclusive jurisdiction* in the court first acquiring jurisdiction of any action. It is often referred to as the rule of comity or *necessity*."

And, in *Ponzi v. Fessenden*, 258 U. S. 254, at 259-260, Chief Justice Taft quoted with approval the doctrine that where the subject matter of litigation may be the subject of two jurisdictions, it is a principle of right and of law and therefore of necessity that the one who has jurisdiction in the first instant has exclusive jurisdiction, and that

"res is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty."

'The *Heyman* case concerned property, but the same principle applies to jurisdiction over persons as is shown by the great judgment of Chief Justice Taney in *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169, quoted from and relied upon, in *Covell v. Heyman*, (111 U. S. 176, 28 L. Ed. 390).' "

See also *Fred F. Edward v. People of the State of California*, 314 U. S. 186, wherein Mr. Justice Jackson in a concurring opinion discusses national citizenship.

By the very charges contained in this indictment, it must be deemed that Kawakita elected Japanese nationality. Then, the determination as to whether he elected that nationality must be determined by the municipal law of that country. Thus, it must be deter-

mined that Japan recognized he elected its nationality. His name was removed from the alien register at the police station. (See the testimony of Police Officer Keyoshi Sasaki) and he was permitted to travel throughout Japan without an alien permit. He was also given a Japanese passport to go to China. He was drafted as a Japanese national into the military services of Japan, and he was given an office or post in a highly confidential position, to-wit, with the armed forces of Japan in a prisoner of war camp operated by and under the direction of the military authorities, pursuant to International Law.

It is hardly considered likely that such a post or position would be permitted to one who did not have, or was not acquiring, Japanese nationality.

The government's statement about the Chinese is misleading. No Chinese worked in the prisoner of war camp or the mine area designed for prisoners of war. Fujisawa had to obtain Japanese citizenship to get his similar job in the camp. The testimony of Fujisawa in respect to this work and his obtaining Japanese nationality by entering his name in the Family Koseki was as follows:

Q. And what sort of a job did you make application for? (Rep. Tr. 5392.)

A. As an interpreter.

Q. You said you applied at the main office in Tokyo?

A. That is correct.

Q. And can you give us—I think you said it was about July. I will show you a photograph, Defendant's Exhibit AL, and ask you if you recognize the photograph?

A. Yes, sir; that is him.

Q. Speak up so the jury can hear you.

A. Yes, sir, that in Inouye.

Q. Do you know Inouye's first name?

A. Nobuyuko.

Q. And at the time that you applied for the job did you go with Kawakita and Inouye—had the three of you then completed your university course?

A. No, sir, not yet.

Q. And will you state what occurred when you and Kawakita and Inouye went to see Mr. Hayakawa (phonetic)?

MR. CARTER: Just a minute. I object to that as calling for a conclusion of the witness unless a proper foundation is laid.

Q. BY MR. LAVINE: Will you state who was present at the time that you saw Mr. Hayakawa?

A. Mr. Hayakawa, Kawakita, Inouye and myself.

Q. And do you remember about what date it was in July that you saw him?

A. It was in the latter part of July.

Q. And when did you see him—in the morning or afternoon?

A. I believe it was in the afternoon.

Q. And where was the place that you saw him?

A. (No answer.)

Q. I think you said earlier at Tokyo, but where in Tokyo?

A. I believe it was in the Nihonbashi (phonetic) District in Tokyo.

Q. And is that where the offices of the Nippon Metallurgical Company were then located?

A. Yes.

Q. Did you go to his office?

A. Yes, sir; I went to his office.

Q. Just the four of you were present at that time?

A. Yes, sir.

Q. Now, state what you said and state what Mr. Hayawaka said.

A. Well, since Kawakita has mentioned to me that he needed—

Q. No, just state what you recall now of the conversation between the four of you at that time, state anything that happened at that meeting.

MR. CARTER: Just a minute. Are you asking for what everybody said at that time or just what this witness and Mr. Hiyakawa said? I can't understand from your question. Are you asking for the whole conversation?

MR. LAVINE: That is what I am asking for, what everybody said at this conversation.

MR. CARTER: No objection.

THE WITNESS: Well, Mr. Hayakawa asked me whether I had Japanese citizenship or not and I told him that I did not have any and he told me that the company could not hire any for-

eign nationals and besides the prisoner of war camp will be under the direct jurisdiction of the army, so the company could not hire any foreign nationals. And he told me that I will have to get a Japanese citizenship before the company can employ me.

Q. BY MR. LAVINE: Go ahead.

A. So I told him I will apply for Japanese citizenship and then he told me for further instructions to report to the Iwataki factory in Kyoto.

Q. And what else was said at this meeting at that time as near as you can recall?

A. Between Mr. Hayakawa and myself?

Q. Yes.

A. Well, I guess he mentioned to me about the salary, the salary being the basic pay and that was regulated so they could not pay more than what the regulations state for a college graduate, but on top of that we were to receive, I think it was 30 yen as interpreter's allowance.

Q. Did he give you any instructions as to, or tell you what your duties would be?

A. He said that I was to be hired as an interpreter and for further instructions I will report to the Iwataki branch office.

Q. Now, did you thereafter apply to get your Japanese nationality established?

MR. CARTER: Just a minute. I object to it upon the ground it calls for a conclusion of the witness.

THE COURT: Objection sustained.

MR. CARTER: No objection to what actually happened.

Q. BY MR. LAVINE: Well, what did you do thereafter with reference to your Japanese nationality, if anything?

A. Well, my name was entered in the Koseki (phonetic), not in my parents' Koseki but I had to establish a separate Koseki.

Q. You established a separate Koseki?

A. Yes, sir.

Q. Were you then married?

A. No, sir.

Q. You established a separate Koseki. Will you explain to us what you did?

A. Well, I don't know—I can't recall where I went, but I think I went to the metropolitan police station and there I told them in order to work in a Japanese firm as an Interpreter I would have to get Japanese citizenship, and that I came to apply.

Q. And what happened then?

A. I didn't know until December that I had set up a separate Koseki.

Q. And that was December of—

A. 1943.

Q. Now, after December, or, how did you learn that you had set up a separate Koseki or that you were then considered a Japanese national?

MR. CARTER: Just a minute. I object to that question upon the ground it assumes something not in evidence.

THE COURT: Objection sustained.

Q. BY MR. LAVINE: How did you then know that you had set up a separate Koseki?

A. The general affairs section in Iwataki has asked me several times what became of my Japanese citizenship—that is the Koseki, and so I told them that I will apply to my parents, where my parents were born and find out what became of my Koseki and then I found out that my name was accepted and had set up a separate Koseki.

Q. And did you do anything with reference to showing that to the officials of the company?

A. Yes. I took that Koseki Tohon to the general affairs section.

Q. And did you show it to someone there or did you leave it there?

A. Yes, I think I turned it in. I don't remember.

Q. Did you consider that that thereafter subjected you to all the duties and obligations of a Japanese national?

MR. CARTER: Objected to upon the ground it calls for a conclusion of the witness.

THE COURT: Sustained. (Reporter's Tr., 5392, line 7, to 3598, line 12.)

If then the determination of whether Kawakita had elected Japanese nationality depended upon Japanese interpretation, this country was bound to follow the laws of Japan since that country determined of necessity whether he had made an election.

Furthermore, sub-sections (a) and (c) of Section 801 of the Nationality Act provides for the means of dual citizens electing the nationality of the other country in preference to their own.

While subsection (a) provides that one loses one's nationality by obtaining naturalization upon his own application or through the naturalization of a parent, if the subject, however, has dual nationality, it is not necessary for such a naturalization to take place. It gives the right of the child to elect, after becoming 23-years of age, without acquiring permanent residence in the United States, or after becoming 23-years of age expatriating himself as an American citizen by his own voluntary act to be permitted within two years to return to the United States and take up permanent residence. Kawakita did not return to the United States within two years after becoming 23-years of age.

Subsection (c) provides for the loss of American citizenship by entering or serving in the armed forces of a foreign state, if he has or acquired the nationality of such foreign state. And Fujisawa's testimony established this fact. (Rep. Tr., 3621-3628).

The government makes much of the fact that Kawakita did not wear a uniform and that he declared that he was not in the armed forces. But, such declaration or such lack of uniform cannot change the character of the armed forces. One who is so closely connected with the military operation as to be an interpreter in a prisoner of war camp operated by the military author-

ities, and who must take all his orders from the military authorities is certainly in the armed forces whether he wears a uniform, or shoots a gun or not. Our own statutes defining the army would include such a person in the armed forces.

The government has taken inconsistent positions in its brief in relation to Kawakita's work. When it discusses the matter of Kawakita's citizenship, or his loss of citizenship by working in this prisoner of war camp, it takes the position that Kawakita was working for the Nippon Yakin Kaisha Company; that it was a private company; that it had stockholders, and that it was the same as any other private job, and therefore that Kawakita was not in the employment of any governmental agency for which only citizens of Japan were eligible.

If this is true and is the accepted premise upon which the government bases its case, then the treason case must fall, for no matter how vigorously Kawakita is charged with having made the men work for a *private company* he was not giving aid and comfort to the government of Japan. Even if he kicked them in order to make them work, he was only making them work for a private company which alleged mistreatment or assault, if it occurred, was a matter purely of local concern in an organized nation and not subject to subsequent *ex post facto* punishment by the new power which took over.

There can be no question but that the retaining state may in addition to employing the prisoners of war directly permit them to work for private individuals or corporations.

And, at no time did the American Government protest the type or nature of work which was being done at Camp Oeyama as being contrary to the agreements joined in between the United States and Japan, through exchange of telegrams with its own government.

On the other hand, if this company had become a governmental agency, and Kawakita was working for it, then he lost his citizenship pursuant to the provisions of Title 8, Section 801(d). The status of a prisoner of war as merely a private citizen is set out in Floury's book quoting Lorimer regarding prisoners of war and their treatment:

“The captive, or other non-combatant is a private citizen of the world and the rights of humanity inherent in him in that capacity, which emerge the moment he has thrown down his arms, override the rights of both belligerents. His punishment is personal, not vicarious.” (Flory, Prisoners of War, page 44.)

If the company, therefore, was a private company with private stockholders and Kawakita was merely working for a private company, it would not make any difference what he did to make the men work, if he committed an assault it would be merely a local offense.

If the men did not work and were required to work to earn their pay, whatever he did to make them work could not be anything more than local in its nature. And, if the punishments were private punishments for stealing from the warehouse of the privately-owned company, it could not be treason. And, if he took the law into his own hands, it could not be treason. If he merely assisted military guards who had the supervision of prisoners of war in carrying out punishment, this could not be aid and comfort to Japan as a nation but was only helping a private concern, even though they were under military guard.

On the other hand, if this camp was a purely military camp, under the Japanese government, and was purely military in its nature, then Kawakita's employment by it under the Nationality Act of 1940, expatriated him by reason of that employment. That expatriation commenced long before the return of the indictment, as he was employed in 1943.

The nature of the work performed by these "citizens of the world," these ex-soldiers now prisoners of war, was aptly described by Montgomery as follows:

That none of the men were engaged at any time in directly making munitions of war,

contrary to the unwarranted statements in the appellee's brief.

The appellee, on page 89 of his brief, says:

“The appellant does not refer to this portion of the statute by section number (Title 8 U. S. C. 804) but in the context of his argument he discusses Kawakita’s living in Japan more than two years. We assume therefore that he places some reliance upon this section.”

The appellee has missed the point. The two years referred to in appellant’s opening argument is that referred to in Section 801, paragraph (a), which provides the manner in which an American citizen

“by his own voluntary acts”

may expatriate himself, or be permitted

“within two years from the effective date of this chapter to return to the United States and take up permanent residence therein, and it shall be thereafter deemed that he has *elected* to be an American citizen. Failure on the part of such person to so return and take up permanent residence in the United States during such period shall be deemed to be a determination on the part of such person to discontinue his status as an American citizen, and such person shall be forever estopped by such failure from thereafter claiming such American citizenship.”

The Government asserts and re-asserts that Kawakita’s election is of no significance. (Appellee’s Brief page 94). It asserts “he was already under the law of Japan a Japanese citizen.” This, it would seem to us,

offends the lawsuit. If the government's position was that he was not a Japanese citizen, that he therefore would have to be naturalized but had become naturalized or expatriated himself as required either by International Law or under Section 801 of the Nationality Act, as in the case of Gillars (Axis Sally) their position would be different. Axis Sally testified that she only took on German nationality to get a job and that she was compelled to do so. The appellant, however, was a Japanese—Axis Sally was never German. Their positions are entirely different.

See *Gillars v. United States*, 182 Fed. (2d) 962.

But, the position taken by the Government as to the means of shedding American Nationality does not comport with either International Law or Section 801 of the Nationality Act. It is here that the government and the trial court and the appellant differ.

It is the appellant's position that under International Law and the Law of Nations that one may shed one's American nationality in a foreign land by his acts and deeds and by an election in the manner provided by the laws of that country and that, having done so, that he has expatriated himself and that the land of his birth cannot thereafter claim him as its citizen as do the totalitarian countries.

It is here that the case of *United States v. Yasui*, 48 Fed. Supp. 40, in an opinion written by Judge Fee comes into play. It is here also that *In re Territo*, de-

cided by the 9th Circuit, 156 Fed. (2d) 142, comes into play.

The *Yasui case* was reversed by the Supreme Court on other grounds, but the citizenship of the guinea-pig Yasui, an attorney, who went to the slaughter in an effort to determine the legal question of loss of citizenship under the circumstances remains unswerved, although the government, when the case got to the Supreme Court of the United States, did not raise or challenge Yasui's citizenship, a lawyer who had offered himself as this guinea-pig, and thus drew a sentence of one year from Judge Alger Fee of Oregon.

But, the cogent reasoning of Judge Fee in that case as to Yasui's conduct—not in Japan, but in the United States as a dual citizen to the Japanese Embassy—thus electing Japanese citizenship—stands as sound logic and cogent reasoning, and the loss therein was not occasioned under Section 801 of the Nationality Act, but, according to Judge Fee, by International Law.

Kawakita's position is very much stronger than Yasui's. Kawakita, a Japanese, was residing in Japan and there expressed by his mental acts and physical deeds his election of Japanese nationality. He went to the Registrar at the City of Suzuki and had his name entered in the family register. This is very much like children in the United States who are born abroad, who after returning to the United States can declare their American citizenship. They do not have to do any one of the acts specified in Section 801 of the Nation-

ality Act, but by a simple declaration they assert their American nationality and American citizenship.

Kawakita was recognized by the Japanese government, under Japanese Law, to have thus made an election. He was free to go and roam where he wished. He got a Japanese passport. He was drafted under Japanese Law (See Exhibits Z; W; AB and AB1).

The government is in error in stating that Kawakita was not drafted, but was merely frozen to his job. He was given a draft number just the same as other persons who were drafted in military service, and thereafter he was continued in the particular job he had been in before, but subject to all the draft regulations of the Japanese Government. Kawakita's acts as charged in this indictment showed an election of Japanese citizenship. And, he was therefore under International Law and the Law of Nations, which is the Supreme Law of the Land, a hundred percent Japanese and owed no loyalties to the United States at the time covered herein.

The failure of the court to instruct the jury properly on dual citizenship, however, was fatal to the government's case for we believe that a correct statement of the law in respect to a dual citizen is that as to such dual citizen he owes his paramount allegiance to the country in which he is residing; and that even if he was an American citizen by birth nevertheless, if he was also a Japanese citizen, residing in Japan, he owed 100% allegiance to the Japanese government which, so

far as he was concerned, was not an enemy government but a government of his citizenship. And, that while residing there he owed it 100% loyalty.

We took this position ourselves with respect to Japanese-American dual citizens who resided in the United States and punished them for failure to observe this 100% loyalty to the United States.

We believe that the court, therefore, erred in instructing the jury that the only ways in which one might lose its nationality were set out in Section 801 of Title 8, U. S. Codes, as these are not the exclusive methods of losing nationality but only the methods "*under this chapter.*"

In our Opening Brief we set out that the Legislative history of this chapter showed an attempt to consolidate the various ways and means of losing nationality "*under this chapter*" but that they were not exclusive of other means expressed by International Law or otherwise.

. . . .

THE COURT ERRED IN THE EXCLUSION OF DEFENDANT'S EXHIBIT "CO" FOR IDENTIFICATION (THE DEPOSITION OF THE MAYOR OF SUZUKI CITY), AND THE APPELLEE IS WRONG IN HIS STATEMENT OF WHAT OCCURRED IN RESPECT THERETO, (Appellee's Brief, page 95).

After the trial date was set, appellant requested that he be permitted to take depositions of some of the Japanese officials who could not be brought here with respect to the law of Japan with relation to citizenship. A lawyer connected with the army, a Captain in the U. S. Army, was assigned by SCAP, (Supreme Commander of the Allied Powers) to take and get these depositions. His name was Captain Bernard Shandler.

Appellant sent to him the names of the persons, or the persons whose deposition he wished, to-wit, the Attorney General of Japan, the Mayor of Suzuki City, and others, with relation to the effect of entering one's name in the Koseki. As a result of this request, the deposition of the Mayor of Suzuki City was taken. The government at the trial waived any objection to the facts that the deposition was taken without its knowledge or appearance thereat because, as a matter of fact, it had been taken by a Captain in the army, under the authority of the Supreme Commander of the Allied Forces, to-wit, Captain Shandler. It was highly important to determine the procedure and the effect of

such entry in the Koseki 'Tohon, as regarded by Japan, just the same as we might wish to take the mayor's deposition regarding the manner of a person becoming a voter in the City of Los Angeles, or some other proper function. Certainly no one would say that Mayor Bowron was not so qualified if, upon the taking of his deposition, he testified that he was qualified.

Contrary to the government's statement, a proper foundation was laid for the qualifications of the mayor to testify. The government in the trial having

“waived the formalities of the matter, and the facts we did not stipulate,”

and “nobody authorized by me.” (R. Tr. 3516).

“We will waive that reserving any objections we may have to the questions and answers that were taken from the mayor. We will stipulate that he was asked those questions and that he answered them, but reserving the right to object to the admissibility of the statements.” (R. Tr., 3516).

This is a far cry from the misstatement of appellee that the deposition was “excluded as being wholly without foundation.” If it was sustained on this ground it was erroneous for on page 3518 the mayor was asked this question:

“Q. Are you familiar with the laws relating to a Japanese head of the Family entering the names of those in his family as being Japanese nationals in the family register?

A. Yes.”

Objected to upon the grounds it is incompetent, irrelevant, immaterial, no proper showing made of the mayor's familiarity with the laws of Japan. Asking his opinion evidenced of a purely lay-witness. (overruled the answer may stand).

Therefore, the court overruled the objection as to the Mayor's qualifications and permitted that to stand. A witness who testifies that he is a qualified witness lays the foundation for his qualifications unless on *voir dire* the opposing counsel proves that he is not familiar with the laws relating to the Japanese head of the family entering the names of those in his family as being Japanese nationals in the register.

Supposing that the same question had been asked of Mayor Bowron as to an American citizen residing in the City of Los Angeles, where he was familiar with the laws relating to whether he could register to vote and be a voter in the City of Los Angeles. Would anyone say that he had not laid the proper foundation? Every day witnesses are asked if they are familiar with a certain subject matter, thereupon their testimony that they are so familiar lays the foundation for their testimony unless on *voir dire* it is shown that they are not familiar with the subject matter. No *voir dire* testimony was taken however of the Mayor.

Thereafter, Mr. Carter objected, although such foundation had been laid as to his qualification, and in no wise challenged on *voir dire* or rebutted. Mr. Carter objected and the court sustained every objection to the

questions as to the legal effect of the head of a family entering the names of members of his family, including the nephew, in the family register. (R. Tr., 3519), and whether such procedure conformed to Japanese law that when an Uncle enters the name of his nephew in the family register at the request of the nephew residing in Japan such entry constitutes a formal declaration of Japanese nationality, according to Japanese law and procedure.

Could anyone say, if Mayor Bowron were asked if a person registered to vote whether such a registration constituted a formal declaration of the rights of a citizen to vote in the City of Los Angeles, that his answer would not be proper and valid and admissible.

The rest of the questions asked of the mayor of Suzuki City, where Kawakita had his name entered in the family registry, were just as vital to the defense. The Mayor was permitted to testify that the record showed that Kawakita's name was entered in the family register. The Mayor's answer, however, to the question as to whether such entry in the name of his family register constituted an official declaration of Japanese nationality by Tomoya Kawakita according to Japanese law was not permitted to be answered. Nor, whether the entry in that registry constituted an election according to Japanese law that he wished from that time to be considered a Japanese national. (R. Tr., 3591), and that it permitted him [according to Japanese Law] to all the rights and subjected him to all

duties of one of Japanese nationality. (R. Tr., 3521, 3522).

It is interesting to note that when the Mayor was asked if he was familiar with the personal service draft law which applied to the Nippon Yakkin Company and persons not actually in military service in Japan, he replied "No." (R. Tr., 3523).

The court, in sustaining the objection to various questions asked of the mayor did so upon the following grounds:

"The jury will understand the questions in the deposition of the Mayor just read that is just read from Exhibit CO for Identification, as to which the court has sustained the objections, were not sustained on the grounds that the questions were not properly asked, but upon the grounds that the Mayor was not shown to be qualified to express an opinion as to the law of Japan, it not being shown that he was a lawyer or expert in the law of Japan.

I made my ruling upon the assurance that there is better evidence here as to what the law of Japan is, namely in the form of a deposition from the Attorney General of Japan himself. (R. Tr., 3225)."

In this the court was in error, however. The opinions of the Attorney General did not cover the Koseki Tohon and the registry in the Koseki Tohon as asked of the Mayor of Suzuki City, where the occurrences took place; and the court was further in error that such statements had to come from a lawyer, and the court was further in error that having a deposition

from the Attorney General excluded the deposition of the Mayor of Suzuki City.

We think the exclusion of this highly vital deposition on citizenship and its effect was highly prejudicial and reversible error.

“TREASONABLE INTENT” NOT PROVED

The Government's position on the question of intent is woefully lacking in its brief (Appellee's brief, page 4). Its statement of fact constitutes a great misstatement, for instance, it says:

“The appellant delivered the American prisoners of war into the service of the enemy, into the important service of producing munitions.”

This is an absolute falsity. The prisoners of war were sent to the prisoner of war camp under International Law and pursuant to international agreements and the agreement with United States and Japan. Sgt. Montgomery took them to camp Oeyama and delivered them pursuant to his orders. Most of the men had for more than two years been prisoners of war in prisoner of war camps in the Philippines. The misstatement continues:

“He thwarted the prisoner's efforts at continued loyalty to their country, and to his, by forcing them to work and produce for the enemy.”

This likewise is a misstatement. The prisoners of war were legally bound by the terms of the Geneva conven-

tion and the agreement between the United States of America (the Supreme Law of the Land) to obey the orders of the prisoner of war camp and to perform services in them. Disobedience of such treaty agreement was disobedience of the laws of the United States itself. They could either work or starve, and International Law has deemed it better that they work and obey local laws and rules, however distasteful than that they starve.

Kawakita did not force them to work and produce for the enemy; they were required by military and international law to work and produce for the enemy.

Kawakita did not parade before the Military Commander of the camp the efficacy of his role by suggesting that prisoners of war who were then patients and too ill to work be deprived of their meager food rations to make them return to work, since there is no testimony whatever that he made such a report to Lt. Hazama. On the contrary, there is at no time any evidence that Kawakita ever reported any American prisoners of war to the military authorities for maligning, for sabotage or for disobedience. Had he done so they might have suffered a far worse fate and be subject to punishment even up to death. A conspiracy to disobey the orders of the camp was subject to the death penalty. (See Rules and Regulations regarding Prisoner of War Camps.)

The Government asserts with a general broad conclusion but without pointing out specifically, that:

“There is an abundance of evidence upon the issue of intent, apart from the proof of the overt acts themselves. The entire setting, the bearing of the appellant, the sequence of his acts with the prisoners of war and the interchange between himself and them was proven, and established every requisite of intent.”

INTENT TO DO WHAT? Certainly, none of these things showed an **INTENT TO BETRAY THE UNITED STATES**. The essence of the crime of treason is the specific intent to betray the United States. The intent referred to must be a specific intent directed proximately at the betrayal of the United States by levying war or by adhering to enemies, giving them aid and comfort. The nature of the betrayal has to do with the specific delivery of the United States into the hands of its enemies—a delivery, certainly, not manifested by any of the overt acts charged nor the environment of the acts, nor anything that was said or done within it.

The Government has not met our argument in the Opening Brief on this lack of specific intent to betray the United States of America. The record is entirely silent on this subject. The Government asserts that “Kawakita’s intent was fully proven by evidence of the environment in which he acted.” We assert that that environment disproves any intent. If Kawakita was delivering provisions to the enemy from the United States (an act in and of itself treasonable) or delivering military secrets to the enemy, or otherwise acting to

betray the Government of the United States it would be different. But, the environment in which he acted—a prisoner of war camp to which he was drafted (Exhibit W2) and assigned and which was a setting permitted by International Law for the purpose of carrying on a work battalion—was not such a setting as established any intent to betray, but contrary wise.

The appellee's brief further says:

“Kawakita's intent to be disloyal to the United States and at the same time be loyal to the government of Japan is proved by his own direct testimony.”

It is evidenced from the cases which we have cited and which we hereafter cite that Kawakita was required while in Japan to be 100% loyal to that government. Such a loyalty necessarily does not prove disloyalty to the other government; it excludes the the other government, however, from any loyalty whatsoever, and this direct testimony thus quoted proves that Kawakita acted within the scope of the State Department's own announced policy that “an American with dual citizenship, residing in the locale of one of his citizenship, owes 100% loyalty to that government.” None of the things on which the appellee relies in its brief shows any intent to betray.

It is undisputed that from March 1945 until the end of the war, Kawakita was employed in a clerical capacity from 8:00 o'clock in the morning until 5:00 o'clock in the afternoon in the warehouse handling electrical

supplies. We were unfortunate in not being able to produce the hourly and daily work record from Japan which would have disproved that Kawakita was, or could have been, anywhere in the camp during these work hours as the punishment prisoners placed the acts generally before five o'clock in the afternoon, ranging from early in the afternoon until five o'clock. However, his working in that job certainly evidenced no desire to be where he could compel Americans to work or do anything else—his job did not relate to that any longer, but was a purely clerical job keeping track of electrical supplies.

In *Chandler v. United States*, 171 Fed. (2) 921, the court of appeals there observed that that case did not necessitate any detailed examination “as to how far an American citizen, caught in an enemy country at the outbreak of the war, may in order to earn a living and without the stigma of treason, accept employment which in these days of total war might conceivably be of some aid in the enemy war effort. Here, as elsewhere in the law, there may be troublesome questions of degree.”

Kawakita was a Japanese citizen caught in Japan at the outbreak of the war and had to earn a living, and without the stigma of treason applied for a job at the only places that he was sure he might receive the same. There was no thought or intent of betrayal of the United States in that application nor in the assignment of the job that was given to him. Nor, has the

government contended in the trial, nor in its briefs, that employment in this job as an interpreter constituted treason.

The Government asserts that his job did not bring him within the purview of any of the provisions of Section 801 of Title 8 U. S. C. because it asserts his was not "an office, post or employment under the government of a foreign state or political subdivision thereof."

The company itself was drafted into the service of the Japanese Government by an order (Exhibits No. Y1, DM1, D2. Testimony of Sapiro Mori, R. 478, Stipulation, R484). Here, likewise, the proof is clear that as such drafted company, in the service of the government, it was a government corporation just the same as were the coal mines when the Government of the United States took them over and controlled them during the war on Executive Orders, and when Attorney General Biddle took charge of Montgomery Ward & Co., in Chicago. Both of these then became Government controlled. The companies were managed and controlled by Government employees although persons worked for them, and the employees were in the category of government employees. (*United States v. United Mine Workers of America*, 330 U. S. 258.)

Although the employment was with what had been a private corporation, its management and control by the government made it a government corporation within the meaning of this section and employment in

such corporation was necessarily within the confines and purviews of 801 (d) of Title 8 U. S. C. If it was merely a private corporation Kawakita was not guilty of treason in any event.

THERE WAS NO CREDIBLE EVIDENCE AS TO EACH OVERT ACT BY TWO WITNESSES TO THE SAME IDENTICAL OVERT ACT WHICH WAS CERTAIN AS TO TIME, PLACE OR CIRCUMSTANCES.

An overt act is a proper subject for the safeguard of the two-witness requirements under the Constitution.

Overt acts are not just any incidental actions which may happen to occur contemporaneous with the existence of the treasonable scheme or during its execution. They are those parts of the scheme which constitute action in its furtherance, either effecting or attempting the purpose to give aid and comfort to the enemy. The plot or scheme must contemplate a representation of a secret or some connivance, or some understanding with the government of the foreign power sought to be betrayed. It is governmental action and not individual action. These elements are entirely lacking in this case. Such overt acts could not consist merely in innocent acts which have no relation to the treasonable scheme or design, or even acts which might be unpleasant or constitute physical violence or bodily injury, or even acts which constitute what has been de-

fined as war crimes—these are not overt acts of treason. The overt act of treason, which requires two witnesses for proof of such overt act, is a substantial safeguard against conviction by perjured testimony. Wigmore cogently justifies the scheme by pointing out that:

“The opportunity of detecting the falsity of the testimony, by sequestering the two witnesses and exposing their variances in detail, is wholly destroyed by permitting them to speak to different acts.”

(See Wigmore, Third Edition, Vol. 7, Section 2037-2038.)

Dr. Kuttner, discussing the conical view of the requirement of two-witnesses says:

“There are really but two perjured witnesses in whose testimony, a prudent judge would not find flaws and contradictions. The case of *Susanna Dan XIII*, is always cited as a classical example.”

It is therefore essential that the two-witness requirement be specific as to the same date, time, place and circumstances. This is wholly lacking in all of the testimony given as to the eight overt acts; nor do any of the eight overt acts tie in with an intention to betray an allegiance.

Kawakita believed, and had a right to believe, that he was a Japanese Citizen. The court so instructed the jury. And, as such, residing in Japan he had a right to believe that his duty of allegiance was wholly

to Japan, whose citizenship he undisputedly had. As such, his acts (even if proved by credible evidence) would not be of any intent to betray, as he did not have at that time any duty of allegiance to the United States.

In no other treason case do these similar elements appear. In the broadcasting case of Chandler, Best and Gillars, it was undisputed that the appellants had only the citizenship of the United States and there was no claim of dual citizenship in any of those cases. It was stipulated in each of those cases that the defendants had American citizenship. No claim was made to valid citizenship in another country.

The Tokyo Rose case has not yet been decided, by this court, but it is our understanding that she did not claim dual citizenship, but rather Portugese citizenship, and this is the first and only case which involves a citizen of another country, residing in that other country, and whose only claim to loyalty to the United States was that he was born in the United States at an earlier time.

It is stated in *United States v. Gillars*, 182 Fed. (2d) at page 980, that:

“It is not disputed in this case that a citizen in an enemy country owes a temporary allegiance to the alien government, must obey its laws and may not plot or act against it.”

But, a citizen of that country is not in enemy country for that is the country of his citizenship and he, there-

fore, owes a permanent and total allegiance to that government while living there and holding its citizenship.

HUNG JURY IN ITS UNANSWERED VERDICTS

The government has failed to meet our contention that the verdict was in effect a hung jury because the jury did not find on each of the overt acts one way or the other.

Under the case of *Andres v. United States*, 333 U. S. 740, 763, Mr. Justice Frankfurter pointed out:

“Until the twelve judges have agreed on every part of the verdict they have not agreed on any verdict.”

LACK OF SPEEDY TRIAL

There are several other points raised in our Opening Brief which have not been met or answered by the government:

The right to a speedy trial;

The right to be tried where one is found.

None of these matters have been met or answered by the government.

THE UNLAWFUL SEPARATION OF THE JURY

We have pointed out in our Opening Brief how the jurors were not only in different rooms, but on different floors with insufficient marshals to guard them during the period of their separation. Some of the jurors were taken apart from other jurors to barbers and other places. The law requiring sequestration of the jurors makes such separation unlawful. Prejudice must be presumed from the very violation of the mandate to keep the jury together and not allow them to be separated, whether on separate floors or otherwise during the period when they are out for their deliberation in a treason case. Los Angeles has ample jury facilities for keeping the jurors sequestered under the observations of the Marshals. Other jurors are so kept.

THE COERCION IN CONNECTION WITH THE JURY'S DELIBERATION

The appellee has gone to great length to set up a chart on the jury's deliberation, and to set out according to its version "that it was only in deliberation 46 hours and 51 minutes." (Appellee's Brief, page 111.)

According to Appellee's chart, the jury went out to deliberate on Wednesday, August 25th, 1948, a hot August afternoon, and deliberated from 3:30 on in the afternoon until 9:30 that night, with various interrup-

tions. On Thursday morning they again deliberated all day, and Friday all day, and Saturday all day until 4:00 o'clock in the afternoon, when they came in with a request to be discharged.

THE COERCION OF THE JURY

Under the chart under which the Government attempts to justify the length of its jury deliberation, the jury had only deliberated 24-hours and 8 minutes in the jury room itself by Saturday August 28, 1948. The actual time, however, is that it had actually been in custody and confinement four days and nights or 96 hours. It is incomprehensible to believe that they did not discuss the case during the time they were thus confined together for deliberation, at times when not in the jury room itself. In fact these are often most vigorous times of persuasion.

The appellee in their desire to give a mathematical chart of the jury's deliberation have compressed the number of hours to 46 hours and 51 minutes. This calculation was erroneous, even under mathematical figures, as the hours were 49 hours and 6 minutes by mathematical calculation. But, by calculation the time that the jurors were actually together and discussing matters with each other, whether in the jury rooms or outside of the jury rooms, was actually 192 hours and 17 minutes. The jury was sent to the deliberating room on Wednesday, August 25, 1948 at 3:30 in the

afternoon, after being instructed in the morning and returned into court with their verdicts on Thursday, September 2nd, 1948 at 3:47 P. M.

Like most mathematical charts, it does not present a true and graphic picture of the blood, sweat and tears in which the jury engaged in this deliberation. It does not picture the hot and stuffy jury rooms where the jurors were sending for towels constantly—in an extraordinary summer temperature with no airconditioning and with the court telling them that they must continue to deliberate and without any statement as to when they might be discharged. It does not tell the picture of the foreman of the jury, who became so nervously exhausted that he could not see an electric light, that a physician had to be called for him, and that he wanted to fight with other jurors, and because of his illness (as pointed out by another member of the jury) he was relieved of his duties as foreman and another foreman was selected. This is not the picture of a calm and deliberate American jury. The hot torture chamber was too hot even for those believing in Kawakita's innocence, and who could not see treason in such acts as carrying two buckets of paint in place of one.

On August 28, 1948, the jurors were in bad condition and requested discharge. After being refused, they requested recess. The next day the foreman could not see electric lights in front of him. He was suffering from *nervous exhaustion*. The doctor had to be called.

What his physical and mental condition thereafter was is unknown. The defense had no opportunity to learn or challenge that condition. It may be fairly inferred that he was in such bad condition that he could not even act as foreman of the jury and a new foreman had to be selected. No other justifiable explanation exists in the record, since the law and procedure only permits a foreman to be selected—not two. The foreman having been selected, no authority was received or requested from the court nor were counsel advised that another election was to be had of another foreman.

However, we do know that a doctor found Mr. Andrews, the foreman, by August 29, 1948, in such bad neurological and nervous condition that he had to be administered medicine, and the doctor testified that he was suffering from “nervous exhaustion.” Actually, the jury thereafter probably consisted of only eleven competent jurors. There was no showing that the foreman was thereafter over his nervous exhaustion or competent to act.

On at least two other occasions doctors had to be called, all without the knowledge of the defense. This was not fair and calm deliberation permitted by the statute.

The *Haupt* case actually involved only a little more than a single period of deliberation totalling 24 hours. It was not shown in that case that any of the jurors became ill, or unable to deliberate or act; nor that a

doctor had to be called on three occasions to minister to the different jurors.

No case has been cited by the government where the jury has remained out the length of time of the present jury, nor under the circumstances herein cited. In no case has the jury asked to be discharged twice, after stating that it had considered every phase and feature of the case.

Juror Sidel stated that he was willing to go ahead as long as his energies hold out (R. 5624) and it appeared that Juror Clancy was suffering from heart trouble. Juror Nagumo immediately after the jury was discharged had a nervous collapse. The court had been informed—but not counsel—that jury foreman Andrews, who twice requested that the jury be discharged, was suffering from nervous exhaustion. Juror Florence Babb also became ill in the jury room and threw up. (R. Tr. 5774.)

Nowhere do we find in any of the cases cited by the appellee or elsewhere where such an amazing condition existed in the jury rooms.

Furthermore, the deliberations were in a hot and stuffy jury room, without any air conditioning. It was in the heat of the summer. The weather report of the temperature was introduced in evidence as Appellant's Exhibit A on Motion for New Trial. The jurors were constantly in a state of "turkish bath" having used innumerable towels during the deliberation. They

might as well have been in a torture chamber. They never knew when they would be released.

In the case of *Allis v. United States*, 73 Fed. 165, the jury was told, at least, that they would be discharged within a week if they did not agree. After the jury was out already eight days, with no knowledge as to when they might be released from their imprisonment as jurors and the torture chamber constituting the deliberating room, to require further deliberation constituted coercion on the part of the court.

The charge in the *Allen* case, so often referred, involves a murder case which had been tried three times. It had been reversed on two prior occasions and the charge given to the jury in its third trial was not even briefed before the court. The Supreme Court mentioned the fact that the plaintiff, in error, did not file any brief and it does not appear in that case just how long the jury had been deliberating; whether it was more than a portion of a day. In any event, the path which is set was followed by other courts but in entirely different settings. In none of them, however, is there a picture of a jury out 8 days in ungodly hot weather without any knowledge of when it might be discharged.

In the *Allis* case in the District Court, which first had the instruction which came up in the *Allen* case, the court told the jury he was willing to remain there another week. In that case he also told the jury how long, at the most, they might be held to deliberate; but

in this case the jury did not know that they would ever be discharged, for upon the urgent pleadings of the foreman, who was sick and regarding whose physical condition the court was well aware, the court nevertheless sent the jury back for further deliberation.

It was within the knowledge of all the jurors that the foreman of the jury had been sick and under a doctor's care and that another juror had been ill, and it was within the knowledge of the jurors that he was in no physical condition to continue. Yet, in spite of this fact, the trial judge told them to go out and deliberate further.

The effect of such facts before the jury, although unknown to counsel, had even a greater coercive effect on the jury than otherwise for they knew that the judge in sending the jury back to deliberate after its foreman had been so critically ill as to require a physician meant that the judge was determined that the jurors should return a verdict in spite of anything else that might exist.

In no case do we find where the jurors have been given such an instruction where there were facts before the jury that one of its members was ill and unable to continue deliberations for reasons of nervous exhaustion and yet compelled to continue. And, in no case do we find that such an instruction was given in that case with the full knowledge of the jurors. This was not a judicial whisper—it was a judicial command to go back and agree—sick or well. Nor do we find any-

thing before the court to indicate that it inquired as to the condition of the foreman, for whom it had required a physician to be called and to attend to him without the knowledge of counsel.

Had counsel been informed by the court of the illness of the juror, or that a physician had been called for him, or that he could not even see the electric light, and was suffering from nervous exhaustion, counsel would have been entitled to inquire regarding the juror's state of mind at the time he requested to be discharged and to inquire whether the juror was in that mental condition which enabled him to continue deliberations. If he was not in a mental condition to continue deliberation, the case was thereafter being tried by eleven competent jurors and was no longer a full jury of 12 competent persons; and in that state of physical condition (if counsel had been apprised and had been able to have had it established) he was entitled to have the jury discharged.

But the coercive effect on the rest of the jurors of having to be compelled to continue deliberation, with one of its jurors sick and others complaining of other physical ailments, was not the American way of fair jury trials.

It was also shown that Juror Clancy was having heart trouble and took some medicine during the time of the jury deliberations, and that Mrs. Otilie Younger had become ill, and that another woman had thrown up during the deliberations. Nevertheless, even after

illnesses, the jury were told to "march on," like soldiers on a battlefield.

On Saturday, August 28, 1948, the trial judge agreed with counsel's objection that no further instruction should be given to the jury that the *Bollenbach* case so indicated where a jury had been having a hot dispute any statement of the judge might tip the scale—and he simply sent them out for further deliberation. But, on Monday, August 30, 1948, he decided to give the instruction which he did not give on the 28th.

The jury then continued to deliberate until September 2, 1948, at the hour of 3:47, when they returned into court with the verdict as to the eight overt acts. Contrary to evidencing discrimination, the examination of the evidence in relation to the verdicts shows that they could not hold out the marathon any longer. "Eight days of confinement under these conditions was too much for any of them to tolerate, although they had previously expressed themselves as willing to hold out as long as their strength might permit it."

As stated in *People v. Sheldon*, 155 N. Y. 268, 53 N. E. 841, 41 L. R. A. 644, it is said:

"A verdict based upon any other method than by the exercise of the full and free judgment of the individual jurors and the weighing of the evidence is invalid. It is regarded as coercive conduct for the court to threaten to keep the jury in long continued confinement."

and the court further held that:

“The old rule permitting coercion of a jury in order to secure a verdict has been swept away, and under our present method the independence of a jury is respected.”

The court, in that case, which was decided July 7, 1898, quoted from *People v. Olcott*, 2 John. Cas. 301, 1 Am. Dec. 178, where Mr. Justice Kent, in an opinion reviewing prior cases at length paid his respect to the rule formerly existing of compelling an agreement of the jury said:

“ ‘The doctrine of compelling a jury to unanimity by the pains of hunger and fatigue, so that the verdict in fact be founded, not on temperate discussion and clear conviction, but on strength of body, is a monstrous doctrine, but does not . . . stand with conscience, but is altogether repugnant to a sense of humanity and justice. A verdict of acquittal or conviction, obtained under such circumstances, can never receive the sanction of public opinion. And the practice of former times of sending the jury in carts from one assize to another, is properly controlled by the improved manners and sentiments of the present day’.”

It is the duty of the court to discharge the jury if they do not agree after all the views of the several jurors are expressed and presented in the different forms and individual opinions of the jurors are fully and conscientiously made up.

People v. Faber, 199 N. Y. 256, 92 N. E. 674.

In *United States v. Samuel Dunkel*, 173 Fed. (2d) 506, cited among the cases by Appellee's brief, page 127, the Second Circuit reversed the cause because after the jury had deliberated for only more than 12 hours over a 24-hour period in which it had several times requested and received further instructions and explanations of the law (173 Fed. (2d) 507), the jury foreman reported that they were unable to reach a satisfactory agreement, after many hours of due deliberation. The foreman reported that "There is a majority, very much in agreement." The court then gave the instruction in the case of *Allen v. United States*, 164 U. S. 492 at 501. The Second Circuit reversed on the grounds of coercion.

The court points out in that case:

"But notions have changed since the days when the jurors were kept without 'meat, drink, fire, or candle' until they reached an agreement, and, if they were not agreed before the judge was due to move on the next assizes, were carried with him in a cart." (*citing People v. Sheldon*, 256 N. Y. 268, 275, 41 L. R. A. 644), giving a detailed treatment of the historical development of the jury, 173 Fed. (2d) 508).

In the present case the foreman of the jury started to speak about one juror, when the court cautioned him not to tell how the jury stood as to number, said that that juror was not alone. There was sufficient colloquy in the court room to show that any further

deliberation by that jury, of necessity, would have to be a coercive verdict.

The Second Circuit quotes from *Brasfield v. United States*, 272 U. S. 448, at 450, which settled the law on the question of coercion of a jury. It ordered a reversal of the conviction because the trial judge had inquired how the jury was divided numerically. This coercive effect was far less than that indulged here, where the jury twice requested that it be discharged as it was unable to reach a verdict after having considered every phase of the case.

These were business people on the jury, who had as the court was informed, "other things to do." They were told that they had to go back and continue deliberating until they reached a verdict. The chart of their time schedule, under these circumstances, is fallacious and deceitful. As said in the *Brasfield* case, "Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate court and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious, although not measurable, and improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned." (173 Fed. (2d) 510).

We challenge the right to give the charge as given in the *Allen* case in circumstances of the setting of this case. This Circuit has never authorized this charge, coupled as it was with a command that it was the duty of the jurors to agree. No case has been pointed out by the government where the jury had been kept out eight days, without any knowledge of when they might be discharged, unless they did agree.

“Reasonable doubt” had appeared and was adhered to after four days of deliberation. That such reasonable doubt disappeared after four more days of confinement tells the answer to the story. It was coercive.

Trial by a jury, as set out in the Seventh Amendment to the Constitution of the United States, means a *fair* trial by jury. Otherwise it is not a jury trial in its true sense. We challenge the *Allen* construction as unconstitutional and in violation of the Seventh Amendment to the Constitution of the United States, and in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States in giving to the accused a fair trial.

And, we again reiterate the circumstances described by the Supreme Court in *Bollenbach v. United States*, 326 U. S. 607, in which the court pointed out that under the tensions under which the jury was then situated the giving of the additional instruction was highly prejudicial in bringing about a verdict.

The failure of the jury quickly to reach a conclusion has been suggested as an indication of *a balance so delicate* that any error on the judge's part may turn the scales. (See *Nick v. United States*, 122 Fed. (2d) 660, 674, 138 A. L. R. 791; *United States v. Dunkel*, 173 Fed. (2d) 511).

THE ALLEN JURY INSTRUCTION CHALLENGED AS UNCONSTITUTIONAL

We challenge the instruction given by the Court in the *Allen* case as set out in the footnote in Appellee's brief, page 120. This instruction is out of date. It was given at a time when persons had to come from far distances by horse and buggy. Its constitutionality has never been raised, nor have the courts been asked to overrule it. It was first given in 1893 in *United States v. Allis*, 73 Fed. 165 and repeated in *Allen v. United States*, 164 U. S. 492, decided December 7, 1896. It belongs to the era of *People v. Sheldon*, 156 N. Y. 268, 275, which has been long outmoded. It belongs to the days when jurors had to be carried in a cart when the judge was due to move on to the next assizes, but those "horse and buggy days" are gone; so are the days when a jury may be kept without "meat, drink, fire or candle until it reached an agreement."

The Seventh Amendment to the Constitution of the United States requires a jury trial, which means a fair jury trial. And, the Fifth Amendment to the

Constitution guarantees trial with due process of law, as that amendment has been defined to mean—"a fair trial." The definition "a fair trial" has received much consideration by the Supreme Court of the United States since 1941.

The instruction given to the jury, under the circumstances of this case, deprived the accused of fair trial guaranteed by the Fifth Amendment and implicit in the Right of Trial by Jury under the Seventh Amendment.

The language of the instruction is false in its second sentence.

The statement that

"Your failure to agree upon a verdict will necessitate another trial equally as expensive."

There is no reason to believe that the failure of the jury to agree upon a verdict would necessitate another trial. As a matter of fact, many cases are dismissed as a result of a disagreed jury. In the present day review of events, the Attorney General and the United States District Attorney frequently evaluate cases and determine whether they should be retried, and frequently end them without a trial by dismissal.

In the instant case, if the government upon re-examination of the facts in the case were to determine that the appellant was no longer an American citizen, he might well have been permitted to return to Japan and the prosecution dismissed.

The statement to the present jury that "it would necessitate another trial" was an incorrect statement of the facts under present day procedure, which might have existed at the time of the Allen case but does not exist today.

Nor is it any of the Jury's business to consider in reaching a verdict whether there will be another trial with other witnesses, or how much expense was involved in the trial. A factor which might compel a taxpayer to surrender conscientious views.

In the Allen case instruction quoted the court there said:

"It is therefore very desirable that you should agree upon a verdict."

The court in the instant case paraphrased the language of the *Allen* case.

The language used by the trial court that "*it is your duty, members of the jury, to agree,*" etc., quoted in full in our Opening Brief, page 232, was not in either the *Allis* or the *Allen* case. As far as the judges went in those cases, at no time did they tell the jury that it was *their duty to agree*, which did violence to their individual judgment and conscience. It is only their duty to act conscientiously whether they reached a verdict or not.

Weathers v. United States, 316 U. S. 636, cited by appellee on page 134 of their brief, does not help. That case quoted a single sentence about the duty of agree-

ment without the other portion of the charge. As stated by the trial court in its charge in the instant case

“I do not speak in any critical vein. We are dealing with an attempt to get 12 human beings to arrive at a common conclusion as to the truth.”

In no case can we find where such a charge has ever been given to a jury which had twice expressed itself as having considered all of the evidence and was unable to agree as to the truth, and had twice earnestly requested to be discharged.

The giving of decorative expressions surrounding this statement cannot relieve the court of the erroneous charge. In *United States v. Dunkel*, 173 Fed. (2d) at page 510, the court said:

“It seems, too, that sustenance cannot be drawn from the jury’s long continued deliberations and apparent care in discriminating between the defendants when it finally rendered its verdict. The very failure of the jury quickly to reach a conclusion has been suggested as an indication of a balance so delicate that any error on the judge’s part may turn the scale.”

That the jury’s returning a verdict was discriminating is shown by an examination of all of the evidence in the case; where treason, for instance, was found on one count where Armellino allegedly was ordered by defendant to carry two buckets of paint—where he had been carrying only one, although two buckets was the required number to carry, and where a person who was

injured was not permitted to be moved without proper medical attention or medical corps men and where he could have been taken to a mine hospital a short distance away, and the charge of treason was that he was not moved to the camp eight miles away until three hours later. These, as well as the other findings of the jury show such lack of consideration as to demonstrate that coercion and *coercion alone* brought in the verdict.

The jurors no doubt prayed long and hard for their own relief from confinement.

THE DUTY OF KEEPING THE JURY SEPARATE OR NOT SEPARATE, OR KEEPING IT IN PROPER PLACE OF QUARTERING WAS THE COURT'S FUNCTION, NOT COUNSEL'S.

We were not consulted as to where the jury was to be taken, or kept, or the manner of their keeping. At the last minute, and without our consent, a new Marshal was imported into the case to take them over—one who had handled many juries and who was a former lieutenant in the United States Navy. To require appellant to show prejudice would be to destroy the very doctrine of presumption that an unconstitutional or improper handling of the jury is in itself prejudicial.

REFUSAL TO POLL JURY

Appellee asserts there was no error in the court's refusal to poll the jury, as requested by the appellant.

Appellee misunderstands the nature of the request. The court, in this case, had submitted special instructions or interrogatories to the jury, which it had denominated "special verdicts" and these might be viewed as pursuant to Rule 49 Rules of Civil Procedure, which permit special verdicts and interrogatories.

This is the first case which involves "special verdicts or inquiries" to the Constitutional definition of treason, where, so far as we can find, there has been a request made to poll the jury to see if the constitutional requirement of two witnesses to the identical transaction have been established. We sought only thereby to determine whether the mandate of the Constitution had been complied with.

A special verdict has been used as an aid to the court and jury in a treason case. But, it is necessary to find out if all twelve jurors agreed as to the special verdict by the constitutional mandate of two witnesses; that is, the names of two witnesses. No such polling was permitted by the court, and we believe that it was error.

Furthermore, the failure to return an answer to each of the "special verdicts" resulted in a disagreement. No case holds, so far as we could find, that

where special verdicts were submitted to the jury as to the different overt acts, that the jury was not required to answer the special verdicts as to each of the overt acts or the overt acts must be withdrawn. Neither was done in this case, although the trial court gave the government a chance to withdraw the overt acts on which the jury made no finding after the jury returned, and when the appellant demanded that the jury be sent out for further deliberation to complete its verdict.

The failure to send them out and the failure to withdraw the overt acts, we respectfully submit resulted in a hung jury.

See also *Walker v. New Mexico and S. P. R. Co.*, 165 U. S. 593, 41 L. ed. 837.

We think the accused is entitled to have the jury polled to determine the names of two witnesses who testified as to the two identical overt acts in the opinion of the jury. Otherwise four of the jurors might have believed that certain witnesses testified as to one overt act, four as to another and four as to still another, and there be no actual unanimity as to the two witnesses which the jurors each thought established the overt act in question.

(See Wigmore, Third Edition, Section 2038, Vol. VII, page 271; *Cramer v. U. S.*, 325 U. S. 1; *Haupt v. U. S.*, 330 U. S. 631.)

LACK OF SPEEDY TRIAL

The appellant asserts and again re-asserts that his trial in the United States, being indicted more than two years after the alleged offense and after he had repeatedly reported to the Army in Japan and to the American Consul in Japan, deprived him of a fair and speedy trial guaranteed by the Constitution. Time and space dissipated both witnesses and evidence. Our complaint of lack of evidence was based upon both of these elements and compelling the case to trial in an atmosphere of war hysteria in a state which the then Attorney General of the United States said could not try a Japanese person fairly.

COMPLAINT REGARDING TRIAL COURT

Our complaint regarding the trial court was based principally upon our difference of legal opinion regarding fundamental rulings involving lack of proof of treason, dual citizenship, loss of nationality, speedy trial in Japan and other basic rulings which this court in its essence is required to pass upon, the lengthy and unwarranted deliberations of the jury and the final judgment imposed by the trial court in giving the appellant the death sentence in this case.

Appellee asserts that the trial court was not arbitrary in sentencing this appellant to the death sentence, and states in his position that the trial judge said:

“ . . . the only worth-while use for the life of a traitor, *such as this defendant has proved himself to be*, is to serve as an example for those of weak moral fibre who may hereafter be tempted to commit treason against the United States.”

The appellant did not prove himself to be a traitor. On the contrary, he disproved himself to be a traitor. At no time did he admit any acts of treason against the United States. The undisputed proof showed him to be a Japanese citizen. As such he owed 100% loyalty to Japan. This excluded any possible treason. Has cross-examination of the Government witnesses also developed a complete lack of treason in any of the overt acts found by the jury? He proved his innocence, and did not prove himself to be a traitor. Hence, no comfort can come to the appellee for the arbitrary actions of the judge. A careful reading of the statement of the trial judge is:

That he believes that the only worth-while use for the life of *any person convicted of being a traitor* is to serve as an example for those of weak moral fibre and to give them the death sentence.

This is not the exercise of discretion; it is arbitrary and capricious and is not warranted in the light of the law and the facts in this case.

Mattox v. U. S., 146 U. S. 140, 144, 36 L. Ed. 920;

Zeveig v. U. S., 60 F. Supp. 785.

We have covered the subject matter of INSTRUCTIONS in our Opening Brief. Basically, the trial court's error was in connection with the law relating to dual citizenship, as we frequently argued it in the trial of the case, and throughout our opening brief and as well as in offered instructions and as to the effect of treaties regarding aid and comfort.

It is our position that a correct instruction in view of the dual citizenship of the appellant was that if the appellant as a dual citizen honestly believed that he owed total allegiance to Japan he could not be guilty of treason.

As to the instructions given by the court, the trial court throughout ignored the issue of dual citizen. For instance, in Instruction 11-F the court stated (page 312 Clerk's Transcript):

"In order then to be relieved of the duty of allegiance imposed by American citizenship, one must do some voluntary act of renunciation or abandonment of American nationality and allegiance. And it is the policy of our law to permit free exercise of the right of expatriation by all American citizens everywhere."

And, in Instruction 11-L (page 325 Clerk's Transcript) the court said, correctly, we believe, under its duty of dual citizenship that:

"As stated before, the defendant was at liberty during his stay in Japan to renounce or abandon his American citizenship and with it all duty of

allegiance to the United States. But unless and until he did so, the defendant owed allegiance under our law to his native country, the United States.”

It ignores entirely his dual citizenship and his rights and duties as a dual citizen.

On the subject of dual citizenship, the defendant offered several instructions, pages 153 and 154 of the Clerk's Transcript. On page 154 of the Clerk's Transcript the defendant offered an instruction on the duty of a dual citizen to the country in which he resides and to which he owed paramount allegiance. And, he offered instructions 49 on page 157 of the Clerk's Transcript on his rights and duties as a dual citizen. Also on pages 158 and 159 of the Clerk's Transcript, which the court refused.

Nor did the government answer our objection to the court's failing to give the jury defendant's instruction number 80-A regarding the fact that the entry of the defendant's name in the Koseki Tohon, or family register, was under the law of Japan a formal declaration of allegiance to that country, and by causing his name to be entered into it after he was 21-years of age he elected to be a Japanese subject.

The appellant offered several instructions which the court refused on the legal situation as to the defendant being found in Japan, and as to the fact that after the Americans took over Camp Oeyama it was their duty, to punish anyone for violation of the laws of the United

States, and particularly treason. (Clerk's Transcript, pages 189, 190.) And, as a matter of fact, if they did not punish the appellant for treason such persons were guilty of misprision of treason under the laws of the United States.

On page 182 of the Clerk's Transcript, the defendant offered Defendant's Instruction No. 82 regarding the resumption of appellant's citizenship of Japan as a dual citizen.

The court also refused defendant's proffered instruction 86-A regarding the status of war prisoners, that they were no more than a labor battalion who were subject to discipline for violation of the rules and regulations of the camp. The court erroneously refused this instruction, as follows:

“DEFENDANT'S INSTRUCTION NO. 86-A

You are instructed that while the Japanese Government did not sign the Treaty of the Hague, it nevertheless agreed through the Swiss Government to apply those principles *mutatis mutandis*. Under this agreement Japan could treat the prisoners of war as a labor battalion, and could discipline the men who failed to live up to the rules and regulations, or who violated its laws, in the same manner as it inflicted punishment upon its own men.

Therefore, if you find from the evidence that any of the men who were prisoners of war violated rules and regulations, or committed crimes

while prisoners of war, and that they were punished for it, and even if you find that the defendant aided or assisted in that punishment, you cannot find the defendant guilty of treason. If you have a reasonable doubt whether the defendant merely aided in carrying out punishment as a part of discipline required among prisoners of war, or whether he did those acts with treasonable intent to adhere and give aid and comfort to the enemy, you must acquit him.”

The defendant’s proffered instruction on page 205 of the Clerk’s Transcript that if he did the things in an individual capacity he could not be guilty of treason was an instruction similar to one given in the *Cramer* case. The defendant was entitled to have it given.

We offered an instruction on the right and the power of American Military Tribunals to try the appellant for treason, and that a prisoner of war camp taken over by the United States is a district or place where one may be found. (Clerk’s Tr., 228, 229, 230, 231, 232.)

THE 2-WITNESS RULE. THE COURT ERRED IN REFUSING TO POLL THE JURY

When the jury returned into court, we asked that the jury be polled as to the names of the two witnesses which the jury thought established each overt act found by them. This request was denied by the court. We think it was vital.

The statement by the government as to the number of witnesses to each overt act (Appellee's Brief, page 109) proves nothing as it does not establish which one of the witnesses the jury believed established each overt act.

We think we were entitled to have the jury polled on this question.

See Wigmore, Third Edition, Vol. VII, Section 2038, pg. 271.

"Treason" is the gravest of all crimes. By its nature it can only be charged or suspicioned in time of high tension, when heightened public passion tends to raise many unpopular beliefs or desires or animosities to the stature of unpatriotic conduct and enlarge the danger of unjust or unfounded accusations of disloyalty or constructive crimes of treason. Our constitution protects as much in time of war or civil dissension as in time of peace and quiet against such constructive treason and unfounded accusations, and in recognition of these guarantees our Supreme Court under the Constitution has done great service in avert-

ing the abuses of treason charges as instruments of oppression.

Cramer v. United States, 325 U. S. 1.

That court has insisted upon careful definitions of the offense; has directed requirements of proof to the end that treason shall comprise only conduct directly aimed at the foundations of government—levying of war or directed to the securing of success of its external enemies through devious means or outward manifestations of intent to deliver our government into the hand of the organized enemies, while that person is only a citizen of the United States, and owes allegiance to it, by adhering to the enemies and giving aid and comfort as an organized government.

The appellee has urged upon this court an expansive construction of the constitutional definition, and a narrowing of its procedural safeguards.

This case arose when an ex-G I, a former prisoner of war of Camp Oeyama, saw the defendant in a Sears-Roebuck Store in Los Angeles, California. All of his animus of those years of suffering in Battan and the Philippines, and later in Camp Oeyama, while he was a prisoner of war under International Law directed by governmental authority, flashed through his mind and he was “ready to kill the defendant” against whom his sole complaint was “that he had not permitted the former prisoner of war to smoke in an area where smoking was prohibited, and did not permit him to complete eating some nuts.”

That fury translated itself into an investigation by the FBI. After more than nine months of investigation the charge of treason was lodged in the United States. The mountain of labor produced a mouse of results.

The first indictment charged eleven overt acts. A superseding indictment amplified it to fifteen. These covered a period of a year. All of the acts concerned conduct within the prisoner of war camp where these men were confined within the power, under International Law, of Japan, and Kawakita too was within the power of Japan.

Immediately after America won the war, however, Kawakita was then within the power of the United States. If he was such a traitor as charged, then short-shrift could have been made of him by the Military forces of Japan. He was subject, under International Law and Military Law, to immediate court-martial by the Armies of the United States, which had taken over; and he was subject later to trial before the Military Commander established the following January in Japan and at all times subsequent thereto. No search was made for him. He knocked at the doors of the American Consulate repeatedly, and at the door of the Army of Occupation. No charges were lodged against him.

His opportunity to defend, had such charges then been lodged against him, would have been far greater than at the time he was brought to trial in the United

States, not only by the fact that witnesses and documents were then available to disprove the charges made, which later disappeared and were unavailable, but he could have shown by innumerable witnesses in Japan that at the times when it was claimed that he was "aiding the military in inflicting punishment" for theft, cutting up government blankets and other matters, he was actually working in the electrical shop as a clerk, which work ended at five o'clock in the afternoon, but many Japanese witnesses whose names or whereabouts were unavailable at the time of trial would have been available to him under his right to a speedy trial.

These issues have not been met by the government at all, nor has it denied—as it could not—that this so-called traitor was used by Major Martin, who was in command of the Camp Oeyama after the Americans took over, to take the boys out sightseeing to various places near Camp Oeyama and for various entertainment in which they indulged, and even for the setting up of prophylactic stations to preserve their health. It was Kawakita who arranged for transportation away from the camp, and he was the last one at the camp to wave farewell to them. And, it is incomprehensible to believe that any of these occurrences would have taken place if Kawakita was a traitor, or that any of the men at this farewell scene thought he was a traitor. If so, he would have been locked up immediately and punished. But, instead of that Kawakita believed that he still was a Japanese with no other rights

than his duties to Japan. He remained in Japan and went to work in Japan. Had he thought he was an American he might even have asked these men if he could return to the United States with them.

It is significant that it was not for several months afterward when Kawakita inquired from the American Consulate what he could do to regain his American citizenship that he was told by the American Consulate that he had dual citizenship, and it was on the action of the American Consulate and the preparation of a document by the Clerk in the American Consulate office that he applied for transportation to return to the United States on the explanation of the dual nationality—and on which the government in this case largely relied.

The government brought Meiji Fugasawa to the United States as one of its witnesses. He was the other interpreter who was working in the camp and was actually the Camp Interpreter during the time of this trial. During the time of trial, he was an employee of the United States Government in Japan.

Although he gave testimony against Kawakita in the trial, and aided and assisted the government wherever he could, he admitted on examination by the appellant that he at no time had ever heard while in Japan that Kawakita had ever struck, beaten, or otherwise hit any of the persons named in the indictment; nor had he ever seen Kawakita at any time assist the

military authorities in inflicting any punishment, although he did see punishment inflicted by the military personnel. He also testified that he himself was in great fear of the military Sergeant Ichiba and Akamatsu. That he was at all times interpreter in the camp itself, and from March until the end of the war, the only times he saw Kawakita in the camp was when the Camp Commandant called Kawakita to assist him in interpreting letters or messages of prisoners of war.

Although the appellant put on Dr. Lemoyne Bleich, the only medical officer of the United States who was a prisoner of war and who was delegated by the Japanese government to examine each prisoner of war daily as to his fitness to work, and whose recommendations as to their fitness was taken by the Japanese Commandant, literally speaking, nevertheless Captain Bleich did not ever testify to seeing or hearing of Kawakita ever mistreating any prisoner of war. Dr. Bleich witnessed the so-called punishment of J. C. Grant and tried to get him out of the pool, but he did not observe Kawakita around. It is incomprehensible that if any prisoners of war had been beaten or struck and in any wise seriously injured the fact would not have been reported to Dr. Bleich or that they would permit a treasonable Jap to show them the pleasure resorts of Japan and act as their favored or chosen interpreter among three available. We think Tomoya Kawakita is the unfortunate victim of the aftermath of war psychosis, that he is completely innocent and that he should be completely exonerated.

We pray for reversal of the judgment and an order directing the court below to enter judgment of acquittal, or dismiss the indictment.

Respectfully submitted,

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Nos. 12070, 12071

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MYRON E. GLENN, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD.,

Defendant-Appellee.

RAYMOND F. DRAKE, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD.,

Defendant-Appellee.

APPELLANTS' SUPPLEMENTARY BRIEF.

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Nos. 12070, 12071

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Defendant-Appellee.

APPELLANTS' SUPPLEMENTARY BRIEF.

Short History of Proceedings.

This supplementary brief will cover two appeals taken from cases consolidated for trial below, and by stipulation consolidated on appeal insofar as the rules of this Court permit. Reference to the *Glenn* case is made by the letter "R." Reference to the *Drake* case is made by the word and letter "Drake R."

The first complaint was filed March 19, 1945, setting forth an action by employees against their employer for overtime compensation, liquidated damages and attorneys' fees under the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U. S. C. A., §201, *et seq.*).

Following the enactment of the Portal-to-Portal Act of 1947 (Act of May 14, 1947, c. 52, 61 Stat. 84; 29 U. S. C. A., §251, *et seq.*), plaintiffs filed their third amended complaint on September 2, 1947 [R. 103]. Issue was joined by the defendant's answer to this pleading [R. 131]. Trial by jury was demanded [R. 219; Drake R. 76].

The District Court (Hon. William S. Mathes, District Judge) on May 18, 1948, granted defendant's motion for summary judgment and ordered the actions dismissed [R. 329; Drake R. 100].

Judgments of dismissal were signed and filed on June 8, 1948 [R. 331; Drake R. 103]. No findings of fact, conclusions of law or opinion were made or filed, except as the District Court's ground for dismissal may be set forth in its orders [R. 329; Drake R. 100].

Notices of appeal were filed by plaintiffs on June 29, 1948 [R. 334; Drake R. 106]. Defendant does not appeal from the said judgments.

Concise Statement of the Facts.

A detailed statement of the case and the facts will be found beginning at page 6 of Appellants' Brief. There follows under this heading a short undocumented statement of the facts.

These cases concern the right of employees to recover overtime compensation and liquidated damages under the Fair Labor Standards Act of 1938 and the Portal-to-Portal Act of 1947, for work performed by the plaintiffs for the defendant. The work for which compensation is sought was performed prior to May 14, 1947.

Defendant is a public utility engaged in the generation, distribution and sale of electric power in interstate commerce. Plaintiffs, employees of the defendant, fell into four categories of employment:

- (a) Substation operators and attendants;
- (b) Relief substation operators and attendants;
- (c) Hydro employees;
- (d) Primary service men.

Except for the primary service men, most of the employees worked and lived in remote, lonely and out-of-the-way places *on the property of the defendant*. They were required by their employer to remain on duty for 24 hours of the work day.

The relief operators and attendants were required to travel from station to station and stay overnight away from their homes and families while performing 24 hour duty at successive stations for one or more days at a time.

The primary service men worked generally on 8 hour shifts, but at the termination of the particular shift they were required to remain at their homes in order to be available to respond to emergency calls. They were paid for "call-outs," but they were not paid for answering or

disposing of matters over the telephone. At Santa Paula, the names of the primary service men were listed as such in the local telephone book and they were required to take complaint calls at their residences from customers. This was the only office available to customers at night. The men were not paid for receiving these calls, but did receive overtime pay if they actually went out to perform "emergency services."

Quite apart from custom and practice, the plaintiffs were employed pursuant to instructions of the defendant, Order No. A-36, which order provided for a 40 hour work week with the following provision as to overtime: "Overtime for employees on a monthly rate of pay shall be paid at one and one-half times the average annual hourly rate. . . ."¹

¹Paragraphs 4, 5 and 8 of defendant's Substation Division Order No. A-36 reads [Pltfs. Ex. 2, pre-trial Drake, R. 172]:

"4. *Classification of Employees*

B. *Field and office employees* are classified and defined as:

- (1) *Shift employees*, which includes all classes of plant operators, guards, watchmen, and any other employee that may be temporarily assigned to this classification.
- (4) *Week-period employees*, which includes station attendants and any other employee who may be temporarily assigned to this classification.

5. *Hours of Labor*

B. *Field and office employees*

- (1) For *shift employees* the regular hours of work shall be any scheduled eight hours in a work-day. Forty hours of work shall constitute a work-week. Days off shall be equivalent to two days per work-week. The work-week is established as starting Monday and continuing through the following Sunday.
- (4) *Week-period employees* have no regular scheduled working hours and are subject to call twenty-four hours per day on each day worked. Forty hours of work shall constitute a work-week. Days off shall be equivalent to two days a work-week. The

Appellants' Contentions on Appeal.

Appellants contend:

1. Summary judgment should not have been granted under the Fair Labor Standards or Portal-to-Portal Acts inasmuch as the issues of fact are complex and in dispute.

2. The Portal-to-Portal Act of 1947 does not bar recovery inasmuch as plaintiffs' activities "comprise the regular, normal part of the employment," whereas Section 2 of the Portal-to-Portal Act is "directed against claims for compensation for activities, such as dressing for work, traveling within the plant to the job location, etc."²

work-week is established as starting Monday and continuing through the following Sunday.

8. *Overtime compensation*

C. Overtime for employes on a monthly rate of pay shall be paid at one and one-half times the average annual hourly rate (see paragraph C3 following) except that, if working conditions permit, such overtime may be compensated for by either:

(1) Requiring employes to take equivalent time off within the same work-week, or

(2) Requiring employes to take time off in a subsequent work-week, but within the same pay period (1st to 15th, or 16th to the end of the month) on the basis of one and one-half hours off for each hour of overtime previously worked.

(3) *Average annual hourly rate of pay:* With respect to an employe paid on a monthly salary basis, the monthly salary is subject to translation into its equivalent weekly wage for the purpose of payment of overtime and holiday compensation by multiplying the monthly salary by 12 (the number of months in a year) and dividing the result by 52 (the number of weeks in a year). The hourly rate is then determined by dividing the weekly wage by the normal scheduled working hours in each week."

²*Biggs v. Joshua Hendy Corporation*, 183 F. 2d 515, 520 (C. A. 9, 1950, Orr, C. J.).

3. Plaintiffs' services were compensable under express contract.

4. Plaintiffs' services were compensable under custom or practice.

5. The defendant was not relieved of its obligations to plaintiffs by reason of Sections 9 and 11 of the Portal-to-Portal Act.

6. In the face of plaintiffs' contention that they are entitled to recover on an express contract, irrespective of statute, to bar recovery would be to apply the Portal-to-Portal Act unconstitutionally.

Appellee's Contentions.

Appellee disputes the contentions of the appellants in part as follows:

1. Plaintiffs contend that they are entitled to 24 hours of pay for each day that they were on duty for that length of time. Defendant contends that it may divide the duties of plaintiffs into "active" and "inactive," and that it may compress both types of duties and evaluate them at but 8 hours per day.

2. Plaintiffs contend that they are entitled to compensation for "active" and so-called "inactive" services, both under the Fair Labor Standards Act of 1938 and the Portal-to-Portal Act of 1947. They contend that throughout the 24 hour tour of duty, the activities were the same and that there cannot be a distinction made between "active" and "inactive" duty. On the other hand, defendant contends that there were separable inactive services which were not compensable under the Portal-to-Portal Act.

3. Plaintiffs contend that the Portal-to-Portal Act was intended to reach so-called portal-to-portal activities sometimes referred to as preliminary and postliminary activities, and that the statute has “no application where, as here, the work for which compensation is being claimed is the same kind of work as was performed throughout the remainder of the workweek”³ or workday. On the other hand, defendant contends that the legislature did not so intend and that Section 2 as distinguished from Section 4 of the Portal-to-Portal Act does not apply only to portal-to-portal activities but to all activities.

Supplementary Argument.

This Supplementary Brief is limited to those points of Appellants’ Brief as to which there have been subsequent decisions.

³*Biggs v. Joshua Hendy Corporation*, 183 F. 2d 515, 520 (C. A. 9, 1950, Orr, C. J.).

POINT I.

Summary Judgment Should Not Be Granted in Overtime Wage Cases.

Cases under the Fair Labor Standards Act of 1938 and the Portal-to-Portal Act of 1947 are generally concerned with complex fact situations and are consequently not subject to summary judgment.

Kennedy v. Silas Mason Co., 334 U. S. 249, 68 Sup. Ct. 1031, 92 L. Ed. 1347 (1948);

Twigg v. Yale & Towne Mfg. Co., 7 F. R. D. 488 (D. C. N. Y., 1947).

In *Skidmore v. Swift & Co.*, 323 U. S. 134, 136, 89 L. Ed. 124, 127 (1944), involving firemen who were required to stay on their employer's premises for 24 hours a day, the Supreme Court stated:

“ . . . We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts, as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court.”

In *Colby v. Klune*, 178 F. 2d 872, 873-5 (C. A. 2, 1949), a case decided subsequent to the submission of these appeals, the Second Circuit held that the defendant's undisputed affidavits showing the non-executive character of duties performed by its production manager (whose stock activities formed the basis of an insider's profits suit under the Securities Exchange Act) did not authorize entry of summary judgment for defendant, since demeanor of witnesses constituted important element in determining credi-

bility and, when ascertainment of facts turns on credibility, triable issues of fact exist.

Circuit Judge Jerome Frank, writing for a unanimous court, stated (178 F. 2d at pp. 873-5):

“That there is here a triable issue of fact appears from the following:

“(a) Assuming for the moment that Rule X-3b-2, issued by the S. E. C., is not authorized by the statute, we construe ‘officer,’ as used in Section 16 (b) of the Securities Exchange Act, thus: It includes, *inter alia*, a corporate employee performing important executive duties of such character that he would be likely, in discharging these duties, to obtain confidential information about the company’s affairs that would aid him if he engaged in personal market transactions. It is immaterial how his functions are labelled or how defined in the by-laws, or that he does or does not act under the supervision of some other corporate representative. As we think that, at this stage of the case, it is well to reserve decision concerning the statutory power of the S. E. C. to issue Rule X-3b-2, we think that the plaintiff should be allowed at a trial to produce oral testimony in open court (by examination or cross-examination of witnesses), or other evidence, relevant under the foregoing definition of officer.

“For the affidavits do not supply all the needed proof. The statements in defendants’ affidavits certainly do not suffice, because their acceptance as proof depends on credibility; and—absent an unequivocal waiver of a trial on oral testimony—credibility ought not, when witnesses are available, be determined by mere paper affirmations or denials that inherently lack the important element of witness’ demeanor. As we observed in *Arnstein v. Porter*, 2 Cir., 154 F. 2d 464,

471: 'It will not do, in such a case, to say that, since the plaintiff, in the matter presented by his affidavits, has offered nothing which discredits the honesty of the defendant, the latter's deposition must be accepted as true.' For the credibility of the persons who here made the affidavits is to be tested when they testify at a trial. Particularly where, as here, the facts are peculiarly in the knowledge of defendants or their witnesses, should the plaintiff have the opportunity to impeach them at a trial; and their demeanor may be the most effective impeachment. Indeed, it has been said that a witness' demeanor is a kind of 'real evidence'; obviously such 'real evidence' cannot be included in affidavits. In *Sartor v. Arkansas Natural Gas Corp., Kansas Group*, 321 U. S. 620, 628, 64 S. Ct. 724, 729, 88 L. Ed. 967, the Court said that a summary judgment may not be used to 'withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony'; the Court, in that connection, quoted with approval from *Aetna Life Insurance Co. v. Ward*, 140 U. S. 76, 88, 11 S. Ct. 720, 724, 35 L. Ed. 371: 'There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony.'

"Nor is the situation different because the trial will be before a trial judge without a jury. For how can the judge know, previous to trial, from reading paper testimony, what he will think of the testimony if and when, at a trial, he sees and hears the witnesses? It is because of the crucial element of demeanor-observation that a trial judge's findings are usually binding unless 'clearly erroneous'; his findings have not that effect when he has not observed the witnesses.

“‘All manner of expedients,’ says Dean Pound, ‘have been resorted to * * * to arrive at a written settlement of the facts not dependent on the credit to be accorded witnesses or the impression they may make on the particular trial court. * * * But experience has shown that we cannot be sure that in getting a clear-cut statement of facts in this way, to which the law may be applied, we are not cutting out too much, so in the end to be trying an artificial case instead of the real controversy.’”

“It may happen (although we do not know) that, because of their unavailability at the trial, plaintiff will be obliged to obtain the testimony of some or all of the defendants’ witnesses by deposition. If so, the demeanor-aspect of their testimony will be lost; however, he will at least have the chance to cross-examine them, an opportunity he has not yet had. In reversing a summary judgment, the Third Circuit cogently said: ‘This case illustrates the danger of founding a judgment in favor of one party upon his own version of facts within his sole knowledge as set forth in affidavits prepared *ex parte*. Cross-examination of the party and a reasonable examination of his records by the other party frequently bring forth further facts which place a very different light upon the picture.’”

In Appellants’ Brief, under the subheading “Disputed Facts,” we have set forth some of the triable issues of fact which exist (App. Br. pp. 13-14). Kindly refer also to Point I of the said brief, pages 15 to 21, inclusive.

We are supported in this position by the *Amicus Curiae* Brief filed herein for the Administrator of the Wage and Hour Division, U. S. Department of Labor. Point II, pages 12 to 13, inclusive.

POINT II.

The Portal-to-Portal Act, Including Section 2 Thereof,
Is Not Applicable Since the Activities for Which
Plaintiffs Seek Compensation Were a Regular and
Normal Part of Their Employment and Did Not
Involve Portal-to-Portal Activities.

In Appellants' Brief, Point III thereof, pages 26 to 30, inclusive, we took the position supported by authorities as follows:

The Portal-to-Portal Act of 1947 was not designed to overthrow the type of claim exemplified in the *Armour* case [323 U. S. 126, 89 L. Ed. 118 (1944)], or the *Skidmore* case [323 U. S. 134, 89 L. Ed. 124 (1944)]. There was no public clamor raised by the *Armour* and *Skidmore* cases; the great demand for the enactment of the Portal-to-Portal Act of 1947 came only after and was designed to overcome the decision in the famous *Mt. Clemens Pottery Case* [328 U. S. 680, 90 L. Ed. 1515 (1946)], which had followed in the wake of the *Tennessee Coal* [321 U. S. 590, 88 L. Ed. 949 (1944)], and *Jewell Ridge* [325 U. S. 161, 89 L. Ed. 1534 (1945)] cases.

Please see:

"The Portal-to-Portal Act of 1947," The Bureau of National Affairs, 1-5 (1947), 3 A. L. R. 2d 1097, 1125 (1949);

Central Missouri Tel. Co. v. Conzwell, 170 F. 2d 641 (C. C. A. 8, 1948), aff'g 76 F. Supp. 398 (D. C. Mo., 1948);

Mauro v. Malcolm M. Slaughter & Co. (D. C. N. Y., 1948), 14 Labor Cases, par. 74,438, p. 73,211;

Curtis v. McWilliams Dredging Co. (N. Y. City Court, 1948), 14 Labor Cases, par. 64,352, p. 72,890.

As was said in Appellants' Brief, page 28 thereof, the Portal-to-Portal Act was not meant to apply to other than portal-to-portal activities and so the above cases hold.

Since the filing of Appellants' Brief and the submission of these appeals to this Court, there have been additional authorities supporting appellants' position, including a decision of this Court.

Biggs v. Joshua Hendy Corporation, 183 F. 2d 515, 520 (C. A. 9, 1950);

Manosky v. Bethlehem-Hingham Shipyard, 177 F. 2d 529, 531, 533, 534 (C. A. 1, 1949);

Knudsen v. Lee & Simmons, 89 F. Supp. 400, 406, 407 (D. C. S. D. N. Y., 1949);

Thompson v. Stock & Sons, 9 W. H. Cases 585 (D. C. E. D. Mich., 1950);

Tobin v. Alma Mills, 9 W. H. Cases 563 (D. C. W. D. So. Car., 1950).

In the *Biggs* case, *supra*, this Court, by Circuit Judge Orr, wrote:

"Cross-appellants further contend that work performed by appellants during lunch periods cannot be the basis for recovery under the Fair Labor Standards Act by reason of §2 of the Portal-to-Portal Act, 29 U. S. C. A., §252, because such work is not made compensable by the express provision of a contract within the meaning of §2(a)(1). That section is directed against claims for compensation for activities, such as dressing for work, traveling within the plant to the job location, etc., which are different

from the activities which comprise the regular, normal part of the employment. The section has no application where, as here, the work for which compensation is being claimed is the same kind of work as was performed throughout the remainder of the workweek.”

In the *Manosky* case, *supra*, where the trial court had dismissed a complaint which did not set forth the specific activities for which plaintiff sought overtime compensation, the majority of the court by Chief Judge Magruder wrote (177 F. 2d at pp. 533-4):

“Reading the complaint in the case at bar, we find nothing to indicate that plaintiffs were seeking to recover overtime compensation for travel time to or from the place of performance of their principal activity as mechanics, or for activities, such as washing up or changing clothes, which are preliminary or postliminary to said principal activity. It strikes us that the plaintiffs have been trying all along to state a claim for statutory overtime compensation for excess hours put in by them in their principal productive activity as mechanics, which activity would certainly be compensable under the prevailing collective bargaining agreement.”

In the *Knudsen* case, *supra*, Chief Judge Knox wrote (89 F. Supp. at pp. 406-7):

“*Section 2. Defenses.* Defendant further contends that the overtime claimed here was not compensable by custom, practice or express contract as required by Section 2 of the Portal-to-Portal Act.

“It is evident from the record that plaintiffs have worked 48 hours a week for numerous weeks throughout 1938 to 1945. There was no controversy in this Court over the measure of damages should liability

for overtime be found. On this record, it must be assumed that the claim here is solely for hours worked at the behest of the employer in regular employment, but not compensated at the increased rate required by the Fair Labor Standards Act for statutory overtime. Plaintiffs are not seeking payment for activities which were not thought compensable before the *Anderson v. Mt. Clemens Pottery Co.*, 1946, 328 U. S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515, decision. It is *these newly perceived claims which Section 2 sought to eliminate* and not those based, as here, on working time which always heretofore had been paid for. *Michigan Window Cleaning Co. v. Martino*, 6 Cir., 1949, 173 F. 2d 466." (Emphasis added.)

In the *Thompson* case, *supra*, District Judge Levin rejected the employer's contention that the Portal-to-Portal Act, Section 2 thereof, barred recovery in a case involving lunch periods in which engineers ate and were required to keep a constant watch for safe and efficient operation of machines. The court stated:

"The question then is: Does the Portal-to-Portal Act bar the plaintiffs' right to recovery? It would serve no useful purpose here to set out the well-known provisions of the Act or its legislative history which followed *Anderson, et al., v. Mt. Clemens Pottery Co.*, 328 U. S. 680 [6 WH Cases 83]. The defendant's president and bookkeeper expressed accord with the position of the plaintiffs that the defendant company was by the contract of employment required to pay for all working time and overtime compensation for all hours worked in excess of the statutory maximum. *The court having found that these employees are basing their claims for compensation for the usual activities performed during all the time they were in their respective shifts and that the so-called*

lunch period was, in fact, working time covered by the contract of employment, the claims are not barred by the Portal-to-Portal Act. The provisions of the Act were never intended to bar recovery under facts similar to those found in this case. Compare *Central Missouri Telephone Co. v. Conwell*, 170 F. 2d 641 [8 WH Cases 353]. See also *Michigan Window Cleaning Co. v. Martino et al.* (6 Cir.), 173 F. 2d 466 [8 WH Cases 639]; *Smith et al. v. Cleveland Pneumatic Tool Co.* (6 Cir.), 173 F. 2d 775 [8 WH Cases 750].” (Emphasis added.)

In the *Tobin* case, *supra*, District Judge Wyche likewise rejected the employer’s contention that the Portal-to-Portal Act, Sections 2(a) and 4(b) thereof, barred recovery. The court stated:

“[*Relationship of Portal Act to Principal Activities.*]

“Turning now to the next question, it is the defendant’s position that the stipulation quoted above bars the maintenance of the present petition for contempt under the provisions of the Portal-to-Portal Act on the ground that the pre-shift activities alleged and shown to have been performed were not compensable by contract or a custom or practice. The plaintiff, on the other hand, takes the position that the stipulation has no effect whatsoever on the maintenance of the contempt proceeding contending that the pre-shift activities are not affected by the Portal-to-Portal Act since they were not ‘preliminary’ or ‘postliminary’ activities but were ‘principal’ activities performed prior to the regular working hours, and it further contends that the Portal-to-Portal Act cannot and does not affect actions brought by the Administrator to enforce outstanding injunctions under the Fair Labor Standards Act.

“The defendant’s contention is based on sections 2 (a) and 4 (b) of the Act, 29 U. S. C. A., secs. 252 (a) and 254 (b). Section 2 (a) provides that ‘No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended * * * (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, *except on activity which was compensable by either*’ an express provision of a written or non-written *contract or a custom or practice* in effect at the time of such activity. (Italics added.) Section 4 (b) reiterates the same provisions as Section 2 (a) except that it applies to future claims under the Fair Labor Standards Act, while Section 2 (a) applies to existing claims.

“[*Nature of Employee Activities.*]

“This raises the question whether or not the pre-shift activities performed in the instant case were activities compensable by contract or a custom or practice. It has been stipulated that ‘there was no contract written or otherwise, or custom or practice in effect which provided for the compensation of these employees for the pre-shift time.’

“*Congress when it passed the Portal-to-Portal Act expressed its displeasure with the interpretation given the Fair Labor Standards Act of 1938 by the Supreme Court in the following cases: Tennessee Coal Co. v. Muscoda Local, 321 U. S. 590, 88 L. Ed. 949, 64 S. Ct. 698 [8 Labor Cases, par. 51.175]; Jewell Ridge Co. v. Local 6167, 325 U. S. 161, 89 L. Ed.*

1534, 65 S. Ct. 1063 [9 Labor Cases, par. 51,201]; and *Anderson v. Mt. Clemens Pottery Co.*, 328 U. S. 680, 90 L. Ed. 1515, 66 S. Ct. 1187 [11 Labor Cases, par. 51,233]. This displeasure is shown in the Report of the House Judiciary Committee when H. R. 2157 (the Portal-to-Portal Act) was reported out of the committee. It is there stated (U. S. Code Cong. Serv., 80th Cong., 1st Sess., p. 1030):

“The Fair Labor Standards Act does not define “work” or “workweek” and does not prescribe what preliminary or incidental activities shall be compensable under the provisions of the law. That was left to be settled by the employer and employee, either by express agreement or by implied agreement, based on the custom or practice in that particular place of employment. That had been the general situation for many years prior to the passage of the Act.

“In *Anderson v. Mt. Clemens Pottery Co.* the Supreme Court had before it important issues “concerning the proper determination of working time for purposes of the Fair Labor Standards Act and involved was the question whether time spent in walking on the employer’s premises to the work station and time spent in certain preliminary and incidental activities must be included in the compensable work week.”

“The Court said:

“It follows that the time spent in walking to work on the employer’s premises, after the time clocks were punched, involved “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business” (*Tennessee Coal Co. v. Muscoda Local*, 321 U. S. 590, 598 [8 Labor Cases, par. 51,175]; *Jewell*

Ridge Co. v. Local No. 6167, 325 U. S. 161, 164-166 [9 Labor Cases, par. 51,201]). Work of that character must be included in the statutory workweek and compensated accordingly, regardless of contrary custom or contract.'

"The Congress rightly called this a far-reaching result; in fact it found that result so far-reaching that it passed the Portal-to-Portal Act to put an end to claims which would have wrecked the entire economy of the nation had they been allowed to proceed to a conclusion under the law of the Mt. Clemens Pottery Co. case.

"The defendant contends that the Portal-to-Portal Act goes so far as to strike down claims for overtime work where an employee performs part of his 'principal' activities prior to the commencement of his regular shift on which the activities are to be performed. I cannot agree with this contention.

"I am in accord with that portion of the interpretation given the Portal-to-Portal Act by the Administrator concerning the question of what is considered to be the 'principal' activity or activities of an employee within the terms of Section 4 of the Act. The Administrator's interpretation of the Act is found in Title 29, Code of Federal Regulations, 1947 Supp., commencing at page 4401. Section 790.8 of the Regulations, p. 4413, provides in part as follows:

" '(a) An employer's liabilities and obligations under the Fair Labor Standards Act with respect to the "principal" activities his employees are employed to perform are not changed in any way by section 4 of

the Portal Act, and time devoted to such activities must be taken into account in computing hours worked to the same extent as it would if the Portal Act had not been enacted. But before it can be determined whether an activity is "preliminary or postliminary to (the) principal activity or activities" which the employee is employed to perform, it is generally necessary to determine what are such "principal" activities.

"The use by Congress of the plural form "activities" in the statute makes it clear that in order for an activity to be a "principal" activity, it need not be predominant in some way over all other activities engaged in by the employee in performing his job; rather, an employee may, for purposes of the Portal-to-Portal Act, be engaged in several "principal" activities during the workday. The "principal" activities referred to in the statute are activities which the employee is "employed to perform"; they do not include noncompensable "walking, riding, or traveling" of the type referred to in section 4 of the act. * * *

The legislative history further indicates that Congress intended the words "principal activities" to be construed liberally in the light of the foregoing principles to include any work of consequence performed for an employer, no matter when the work is performed. A majority member of the committee which introduced this language into the bill explained to the Senate that it was considered "sufficiently broad to embrace within its terms such activities as are indispensable to the performance of the productive work."'

"A similar interpretation is given the provisions of section 4 of the Act in the message of the President when he returned the signed Act to Congress. In this message he states that 'the legislative history of the Act shows that the Congress intends that the words "principal activities" are to be construed liberally to include any work of consequence performed for the employer, no matter when the work is performed.'

"In the instant case the activities on which the contempt is based were activities which were a part of the work to be performed by the employee: during the regular shift on which they were employed. The activities do not fall within the purview of the Act excluding certain 'preliminary' and 'postliminary' activities. Instead they are part of the 'principal' activities to be performed by the employees and for which they were employed. Cf. Central Missouri Tel. Co. v. Conzwell (CCA 8), 170 F. (2d) 641 [15 Labor Cases, par. 64,839]." (Emphasis added.)

Judge Wyche has summed up appellants' position here. Furthermore, it is supported by the government in its *Amicus Curiae* Brief for the Administrator of the Wage and Hour Division, U. S. Department of Labor, Point I, pages 5 to 12, inclusive.

POINT III.

Plaintiffs' Services and Activities Were Compensable Under an Express Contract and/or Custom and/or Practice.

In Appellants' Brief and Appellants' Reply Brief on file herein, we took the position supported by authorities as follows:

The plaintiffs herein rendered their services under the terms of and in accordance with an express written agreement [Substation Division Order No. A-36] to receive overtime compensation at the rate of one and one-half times the normal rate of pay. We have reprinted in a footnote, *supra*, the pertinent provisions of the "contract" which has been held sufficient in law to constitute an express contract, custom and practice to entitle plaintiffs to overtime compensation.

Please see:

Joshua Hendy Corp. v. Mills, 169 F. 2d 898, 900 (C. C. A. 9, 1948):

Frank v. Wilson & Co., 172 F. 2d 712, 715 (C. C. A. 7, 1949);

Devine v. Joshua Hendy Corp., 77 F. Supp. 893, 905 (D. C. Cal., 1948);

Llewellyn v. Hardy-Burlingham Min. Co., 73 F. Supp. 63, 66 (D. C. Ky., 1947).

In the *Joshua Hendy* case. *supra*, this Court had before it a substantially similar contract, reading in part as follows (169 F. 2d at 900):

"4. Hours of Employment and overtime.

"Forty (40) hours shall constitute a work week, eight (8) hours per day, five (5) days per week, Monday to Friday, inclusive, between the hours of

8 a. m. and 5 p. m., except that where, as to any locality or as to any plant of any employer, existing traffic conditions render it desirable to start the day shift at an earlier hour, such starting time may, with agreement of the employer affected and the local Metal Trades Council, be made earlier, but in no event earlier than seven (7) a. m. Overtime at the rate of one and one-half times the established hourly rate shall be paid for all work performed in excess of eight (8) hours per day and forty (40) hours per week.

* * *."

In the last mentioned case, the plaintiffs claimed overtime for one-half hour per day which was worked in addition to the 8 hour shift. The defendant contended that it was relieved from liability under the Portal-to-Portal Act by reason of the times when the employees worked only seven and one-half hours. This Court rejected the defendant's contention and held that there was an express contract making the activity compensable within the meaning of the Portal-to-Portal Act. It stated (169 F. 2d at 900):

"It is paragraph 4 of the contract which renders the Portal-to-Portal Act inoperative. That paragraph, it will be noted, establishes the work week at 40 hours straight time and 8 hours overtime and further provides for the payment of overtime for all 'work performed' in excess of 40 hours per week. Mills performed 11 hours work in excess of 40 hours within the meaning of the phrase 'work performed.' He was paid for 8 hours overtime only."

Paragraph 5B (4) of Order No. A-36, herein, specifically states that 40 hours of work shall constitute the work week. It is further specifically provided in paragraph 8C that overtime shall be paid at the rate of one

and one-half times the hourly rate. The instant case therefore falls directly within the facts and the holding of this Court in the *Mills* case, *supra*. It follows that an agreement to pay for overtime services is an agreement to pay for all overtime services irrespective of when those services are performed.

It should be noted that the reference in the Biggs case [183 F. 2d at p. 520] to a possible error in the Mills case, supra, favors the appellants here.

In *Frank v. Wilson & Co.*, *supra*, the employment contract in effect provided [172 F. 2d at p. 715]:

“Employees who are required to work over 8 hours in any one day * * * will be paid one and one-half times their regular rate for all such overtime hours.”

Referring to this Court's *Mills* case, *supra*, the Circuit Court for the Seventh Circuit stated [172 F. 2d at p. 715]:

“In *Joshua Hendy Corp. v. Mills*, 169 F. 2d 898, 900, the Court of Appeals for the Ninth Circuit reviewed a somewhat similar situation. At that plant the normal daily work shift was eight and one-half hours, less a half-hour lunch period. It was Engineer Mills' duty to give almost constant attention to the boiler, which customarily prevented his taking time off for the lunch period. Nevertheless he was paid for only eight hours work per day. The labor contract in force provided that overtime compensation would be paid for all 'work performed' over forty hours per week. The court held:

“* * * It is paragraph 4 of the contract which renders the Portal-to-Portal Act inoperative. That paragraph, it will be noted, establishes the work week

at 40 hours straight time and 8 hours overtime and further provides for the payment of overtime for all "work performed" in excess of 40 hours per week. Mills performed 11 hours work in excess of 40 hours within the meaning of the phrase "work performed." He was paid for 8 hours overtime only.'

"We are bound by the finding of the district court that the plaintiffs were required to work five minutes in excess of the eight regular hours on each of the days indicated by the time cards in evidence (as compiled in the stipulation). We conclude that the activities of the plaintiffs were covered by an express provision of a written contract, and that the Portal-to-Portal Act of 1947 is not a bar to maintaining this action."

Said another way *the rule is that where overtime duties are an integral part of the employment of the employee, those activities are compensable by contract.*

Marchant v. Sands, Taylor & Wood Co., 75 F. Supp. 783, 787 (U. S. D. C. Mass., 1948);

Green v. LeVan (U. S. D. C. Tenn., 1948), 15 Labor Cases, par. 64,777, p. 74,479.

Even without a specific agreement to pay for overtime entered into between the employer and the employees, there is in all employment relationships a contract to pay overtime for work in excess of 40 hours per week by reason of the fact of the incorporation into every contractual relationship of the provisions of the Fair Labor Standards Act.

Conwell v. Central Missouri Tel. Co., 74 F. Supp. 542 (D. C. Mo., 1947), 76 F. Supp. 398 (D. C. Mo., 1948), aff'd 170 F. 2d 641 (C. C. A. 8, 1948).

It should be noted furthermore that the plaintiffs here rendered and the defendant accepted their services under a general custom and practice that all of the plaintiffs' services and activities were to be paid for by a weekly or monthly salary. Defendant contended below that certain of the work of the plaintiffs were "inactive" and therefore not compensable. It also contended below that so-called "active" duties of plaintiffs could be performed in 2 to 5 hours per day; and that evaluating the employment as a whole, the services of the plaintiffs, that is, both the "active" and "inactive" duties, were the equivalent of 8 hours per day. The defendant, by its own admission, was paying the plaintiffs a fixed wage, not only for what the defendant chose to designate "active" duties, but for so-called "inactive" duties. A custom and practice was therefore established by the plaintiffs to pay for all work irrespective of the nature or description of the constituent elements constituting and making up the totality of the efforts expended by the plaintiffs.

Under the circumstances, therefore, it is clear that plaintiffs' services were compensable *in some amount* either under express contract or under custom and practice.

Biggs v. Joshua Hendy Corporation, 183 F. 2d 515, 517 (C. A. 9, 1950);

Frank v. Wilson & Co., 172 F. 2d 712, 715 (C. A. 7, 1949);

Joshua Hendy Corp. v. Mills, 169 F. 2d 898, 900 (C. A. 9, 1948);

Central Missouri Tel. Co. v. Conwell, 170 F. 2d 641 (C. C. A. 8, 1948), *aff'g* 76 F. Supp. 398 (D. C. Mo., 1948);

Mauro v. Malcolm M. Slaughter & Co. (U. S. D. C. N. Y., 1948), 14 Labor Cases, par. 64,299, p. 72,715.

POINT IV.

Defendant Was Not Relieved of Its Obligations by Reason of Section 9 and Section 11 of the Portal-to-Portal Act.

The attention of this Court is respectfully drawn to Appellants' Brief, Points VI and VII thereof, pages 39 to 49, inclusive.

In this brief we have already called the Court's attention to *Colby v. Klune*, 178 F. 2d 872, 873-5 (C. A. 2, 1949), holding that summary judgment is not authorized since the demeanor of witnesses constitutes an important element in determining credibility—or good faith for that matter.

Sections 9 and 11 of the Portal-to-Portal Act involve among other things elements of good faith which obviously require a trial on the merits.

Appellee's contentions with respect to this point were rejected in part by Chief Judge Knox in *Knudsen v. Lee & Simmons*, 89 F. Supp. 400, 405-6 (D. C. S. D. N. Y., 1949) as follows:

"Section 9. One necessary element of a valid defense under this section of the Portal-to-Portal Act is that the employer's action in reliance upon an administrative ruling or policy conform to such ruling or policy. General Statement as to the effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938, 29 CFR, 1947 Supp., 790.14. To satisfy this condition, defendant must show that the administrative opinion exempted these plaintiffs from the Act.

"In my judgment, the Administrator was always of the opinion that work such as was performed by these plaintiffs did not justify exemption from the

Act. The Administrator's opinion was principally expressed in Bulletin 11. I find both versions of this Bulletin to so read, and the Court of Appeals for this Circuit, in considering the revised version, agreed in this interpretation.

"Defendant relies on the Administrator's action in reference to the Smoot Company and the Gale decision. I do not find it inconsistent with my view. The Smoot ruling, of July, 1940, was specifically said not to be of general application. Further, in October, 1940, the Administrator reaffirmed his view that the Smoot ruling was confined to the employees of that company and stated that, 'there should be compliance with the provisions of Interpretative Bulletin No. 11 except where individual establishments have obtained individual notice from the Administrator that their employees shall be considered seamen, and are therefore exempt from the Act.' Finally, in June, 1941, the Administrator reversed the Smoot ruling. This history certainly indicates that the Administrator believed that these employees would not be exempt, rather than the contrary. As to the Gale decision, the Administrator interpreted it as to require that 'employees' duties must be concerned with the navigation of the vessel,' an opinion certainly not helpful to defendant's cause.

"Defendant also contends that its failure to comply with the Act was attributable to *good faith* RELIANCE upon an administrative practice or policy of non-enforcement. It is a fact that the Administrator took no steps to enforce the Act against the lighterage industry. In addition, a field investigator of the Administrator visited defendant's offices in April, 1940, and examined the defendant's books, and also, to some extent, made inquiry into the nature of its business. Following such investigation no demand was made on

defendant to confer on its lighter captains the advantages of the Fair Labor Standards Act.

“This contention falls for the reason that here we do not have a failure to enforce and nothing more, but instead, a failure to enforce coupled with a stated administrative policy, which called for enforcement. The purpose of Section 9 is to relieve employers who have in good faith relied on what the administrative opinion was, even where that opinion was only revealed by a so-called nonenforcement policy. *But where a policy is stated, the mere failure to enforce is not what the law contemplates as constituting such a nonenforcement policy as will relieve from liability.*

“Moreover, the failure of the field investigator of the Wage and Hour Division to find a violation after inquiry into defendant’s payroll practices can not be considered an administrative ruling within Section 9. It does not constitute an opinion of the Administrator and has been so held in prior cases. *Burke v. Mesta Machine Co.*, D. C. W. D. Pa., 1948, 79 F. Supp. 588; *Semeria v. Gatto*, Sup. 1947, 75 N. Y. S. 2d 140; *Wells v. Radio Corp. of America*, D. C. S. D. N. Y., 1948, 77 F. Supp. 964.

“In saying this, I do not mean to state that defendant was acting in *conscious* disregard of the Administrator’s stated policy. Indeed, the record convinces me that such was not the fact. The classification of defendant’s employees depended on the proportion of time occupied between cargo and navigational duties. The administrative record reveals a standard outlined only in the most general terms, and it was not difficult for defendant to deceive himself into believing that the services of his employees fell within the exempt category. However, the decisions of this Court and the Court of Appeals for this Circuit determined

that the nature of the services rendered by defendant's employees placed them within the nonexempt class as outlined by the Administrator. *Defendant having failed to conform to the administrative opinion, although his error was committed in good faith, can not defeat the plaintiff's claim for the advantages of the 1938 Act.*

"Section 11. On the above view of the case, I am of the opinion that defendant is entitled to relief under Section 11 of the Portal-to-Portal Act even though the defense under Section 9 fails. *Ferrer v. Waterman S. S. Corp.*, D. C., Puerto Rico, 1949, 84 F. Supp. 680; *Conwell v. Central Missouri Telephone Co.*, D. C. W. D. Mo., 1948, 76 F. Supp. 398, affirmed 8 Cir., 1948, 170 F. 2d 641; *Sawyer v. Bay State Motor Co.*, D. Mass., 1948, 89 F. Supp. 843. Section 11 provides that 'if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act, * * * the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16(b) of such Act.'

"The record indicates that defendant had reasonable grounds for believing that his employees were exempt. The lack of specificity in the administrative record, coupled with the variable nature of plaintiffs' employment, made defendant's error a reasonable one. Furthermore, the failure of the Wage and Hour investigator to find a violation would tend to secure defendant in its erroneous belief. Anderson v. Arvey Corp., D. C. E. D. Mich., 1949, 84 F. Supp. 55; *Bauler v. Pressed Steel Car Co.*, D. C. N. D. Ill., 1948, 81 F. Supp. 172. *I find, therefore, that defend-*

ant acted in good faith and accordingly, I shall relieve him of the obligation to pay liquidated damages to the plaintiffs.” (Emphasis added.)

Notwithstanding that Chief Judge Knox exonerated the defendant under Section 11 only, we will be happy to have Judge Knox’s principle apply to this case if we could obtain for the appellants a trial on the merits concerning its good faith.

Conclusion.

This is not an action where plaintiffs seek compensation for portal-to-portal activities such as washing, dressing and walking to work. Most of the plaintiffs worked, slept and lived on defendant’s property. Most of the plaintiffs worked on shifts of 24 hours per day.

There was no difference in the working habits of the plaintiffs before or after the enactment of the Fair Labor Standards Act. They still worked 24 hours a day, less sleeping time possibly. *The only change was in the book-keeping of the defendant.*

Defendant contends that it divided the duties of plaintiffs into “active” and “inactive” and that it may in its own discretion compress both types of duties and evaluate them at but 8 hours per day. The law is that plaintiffs are entitled to straight time for 40 hours, time and one-half for all hours worked, “active” or “inactive,” over 40 hours. In the words of the Administrator of the Act, *plaintiffs were engaged to wait and were not waiting to be engaged.* This case, therefore, does not involve stand-by or waiting time. Even if it did, plaintiffs would be entitled to over-time compensation in accordance with the *Armour* and *Skidmore* cases, which cases were not overruled or overturned by the Portal-to-Portal Act of 1947.

The instant appeal gives rise to important and complicated issues of law and fact and should be tried by a court and jury; although it would be most helpful if the Court, in reversing the judgment below, would indicate the correct principles of law to be applied.

Respectfully submitted,

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No. 12070.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MYRON E. GLENN, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., a corporation,

Defendant-Appellee.

No. 12071.

RAYMOND F. DRAKE, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., a corporation,

Defendant-Appellee.

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No. 12070.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MYRON E. GLENN, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., a corporation,

Defendant-Appellee.

No. 12071.

RAYMOND F. DRAKE, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., a corporation,

Defendant-Appellee.

SUPPLEMENTAL BRIEF OF APPELLEE.

Following submission of this case on November 18, 1949, the appellants from time to time have sent to the Clerk of the Court letters containing the citation of cases wherein employees have been allowed overtime compensation notwithstanding the Portal Act. Appellants in no instance have limited themselves simply to citing the deci-

sion or decisions to which they wished to call the Court's attention, but in each letter have attempted some reargument of the case. The propriety of this may be seriously doubted. Were it to be commonly indulged in, it is obvious that the other party could reply with equally argumentative letters, and the Court in finally considering the case would find itself confronted not only with the task of considering the briefs of the respective parties but with a miscellaneous mass of argumentative correspondence.

In the instant case, the inapplicability to the question here involved of each case cited seemed to us apparent on the face of the case and the forwarding letter.

We assume the order permitting the filing of supplemental briefs by the parties was for the purpose of having the additional cases cited by the appellants presented in a convenient form for consideration by the Court and also to furnish appellee an opportunity to comment on them.

Except for these considerations there is really no need of supplemental briefs as we are satisfied that the contentions of both parties have been fully set forth in the briefs on file.

We are filing this supplemental brief only because the appellants are filing one in which we assume they will set forth the cases they have cited in their numerous letters, and we do not desire by not commenting on them to apparently concede their applicability to the instant appeals. Also, we shall take advantage of a supplemental brief to present to the Court decisions since submission of this

case which sustain our position. One of them, *Galvin, et al., v. National Biscuit Co.*, 82 Fed. Supp. 535, 537, approved by the Second Circuit Court of Appeals, we think quite conclusive.

We shall attempt as far as possible to avoid repetition of the arguments advanced in our opening brief, although as that brief fully sets forth the appellee's contention, in one sense it will be impossible not to reargue the principles there relied upon.

We shall refer to the appellant's opening brief by the letters "O. B."; to our main brief as "A. B."; to appellants' reply brief as "Ap. R. B.". We shall refer to the record and our appendix and to the Fair Labor Standards Act in the same way as in our brief.

By the expression "established by the appellants", we shall mean facts averred in their pleadings and/or set forth in their various affidavits, answers to interrogatories, and the uncontroverted testimony set out in their depositions.

I.

The Decision in This Case Involves the Determination of but One Single Proposition of Law and the Facts Material to That Decision Are Not in Dispute.

Our opening brief contains a detailed statement of facts, showing those upon which there is no dispute and those upon which the parties do not agree. We believe in the last analysis that appellants' principal basis for urging a reversal is that where there are material issues of fact upon which there is a dispute between the parties a summary judgment cannot be granted nor can it be granted where different material inferences can reasonably be drawn therefrom. *This we concede.*

However, in our opening brief we pointed out that the court below dismissed the cases *because jurisdiction not only did not affirmatively appear but, on the contrary, was affirmatively shown to be lacking.*

We have no reply from the appellants to the point which we made in our brief—which they could not of course answer—that it is established that a party who invokes the jurisdiction of a federal court has the burden at all times of showing the existence of such jurisdiction.

With reference to that burden, we concede that where there is a dispute as to the facts necessary to confer jurisdiction and those alleged or claimed by the plaintiff to be established by the record, which if proved on a trial on the merits, would establish such jurisdiction, that the case cannot be summarily dismissed. We concede further that there are facts upon which there is a dispute, *but we assert again that the disputed issues are entirely immaterial to the question of the Court's jurisdiction.*

There is no question that under the original Act the District Court had jurisdiction of the actions, and for the purposes of these appeals it may be conceded that the disputed issues of fact would under that Act have been material as to the right of recovery, but they became immaterial to the question of both recovery and the Court's jurisdiction after the amendment of the Act by the Portal Act, *and the undisputed facts which are established by the appellants affirmatively show the Court was without jurisdiction of the subject matter of the action.*

Aside from a few primary servicemen, all of the appellants were what is denominated "resident employees." They were required five nights a week* to live upon the appellee's premises so as to be able to respond to an emergency.

There is no dispute that the primary servicemen were employed upon a definite eight hour shift, at the end of which they could return to their own homes, which were not upon the Company's property. The appellee claims that at the end of their shift they were free to do anything they pleased except that if they did not go home, or after going there left their homes, they must leave with their switching center the telephone number where they could be reached in case their services were needed for an emergency. One or two of them concede that this is true; others claim they were required for five nights a week to remain in their homes to answer telephone calls or to be available for emergency service. All of them

*The Court will recall when Southern California was upon a 48-hour week all of the resident employees were required to live upon the premises six days a week, but for these six days they were paid eight hours of overtime. We shall not lengthen the brief by referring to this wartime period.

concede they were paid time and a half for any work performed after their normal working hours or shift.

On pages 14-17 of our brief we discussed the primary servicemen, pointing out that the appellants had not mentioned them and that in no event could the judgments be reversed as to them. In the appellants' reply brief we find no answer to our contention as to the primary servicemen and, as we recollect, their oral argument was also limited to the right of the resident employees to recover overtime for the sixteen hours a day they remained upon the appellee's premises so as to be available if called on for emergency service. Neither do appellants make any reference to the primary servicemen in any of their subsequent letters to the Court. In any event, it is certain that the primary servicemen are in no more favorable position than the resident employees; hence, we will discuss only the appeals as applicable to those appellants.

Our main brief (A. B. 5-10) contains a detailed statement of the facts setting out clearly the factual differences between the various groups of resident employees, which we believe we showed were entirely immaterial to the questions of law involved in these appeals.

It would seem both unnecessary as well as inappropriate to attempt a repetition of the factual statement. A summary, however, of the main undisputed factual situation may not be inappropriate.

We attach as an appendix, under the heading "Statement of Facts Established by Appellants," excerpts from

appellants' complaint, the affidavits of the appellants, their answers to interrogatories, and their depositions, showing that our following summary of the factual situation, which divested the district court of jurisdiction, is shown by the appellants themselves, without reference to the facts shown by appellee.

UNDISPUTED CONTROLLING FACTUAL SITUATION.

All the resident employees were employed either at substations, hydro stations or head gates and each and all were employed to render certain definite services. These services were to be performed during the daylight hours and between the time of the first designated telephone call in the morning to the switching center and the last required call to the switching center at night. This time was usually between 8:00 a. m. and 5:00 p. m., or 7:30 a. m. and 4:30 p. m., with an hour off for lunch.

We believe the correct designation of the period of time between the first and last call to the switching center would be "normal hours" or "normal working hours." Appellants contend, however, that this period of time was a definite eight-hour shift during which they were required to remain constantly on duty and could not, as appellee contends, leave their respective station houses. Hence, in referring to these normal working hours we shall occasionally, in conformity to appellants' contentions, refer to them as "shift" or "shift hours." By either of those terms or "normal working hours" we shall mean to designate the period between the first and last required calls to the switching center.

It was undisputed that each appellant made out his own-time-card and that each and all always reported eight hours of work per day, whether they actually performed that amount or less, but if on any day they performed more than eight hours' services they reported that as "overtime." We again point to the uncontroverted testimony of appellant Wert.

"A. We put down the date and what we were doing. * * *

Q. *Eight hours?* A. *Yes.*

Q. You put that down regardless of whether you worked more or less than that time, do you? A. Oh, no. *If we work more than eight hours, why, then, we put in for overtime for that.* That goes in a different section of the time sheet." [Wert Dep., pp. 8-10, lines 26-9; Ap. 70-71.]

(This is printed in both our brief and appendix.)

Further, if they were called on between shift hours to perform any services for the company they were paid overtime for the time spent therein, overtime in all cases being computed as though their salaries were applicable to forty hours of work per week.

The main factual dispute was that the appellee claimed that within normal working hours, appellants had no specified time for performing any of their services and that their actual duties, that is, the active services which they were employed to perform, required only a fraction of their normal working hours, and that in the time when they were not actively engaged they could do anything they

pleased, leaving their respective station houses or places of employment and spending their time with their families or in other vocations. The appellants, on the contrary, contend this is not true; that they were employed upon a definite eight hour shift during which they were not at liberty to return to their houses or engage in personal pursuits, but required to remain in constant attendance at their respective station houses or places of work; that at the end of their shift they could return to their houses but could not leave defendant's premises but must hold themselves ready to respond to emergency calls. It is appellants' contention that their salary was paid them for this definite eight-hour shift, and that while they concede they were paid overtime for any emergency services performed between shifts, they were entitled to their overtime payment for the sixteen hours a day which they spent living upon defendant's premises.

Under the original Act, prior to its amendment by the Portal Act, the dispute as to whether appellants during the period which we have denominated "normal working hours" were not at liberty to leave their stations and were generally fully occupied in the performance of their duties, or whether, as appellee claims, only a few hours of that time were consumed in active duties and when not so engaged they were at liberty to leave their stations and do what they pleased, would have been a material issue.

No one connected with the appellee thought that it could be summarily determined upon a motion or otherwise than upon a trial on the merits. But we do not believe that

under the Portal Act it is at all material. While we are confident that upon a trial on the merits we could demonstrate beyond question the correctness of the appellee's contention, *we concede that on this appeal in determining the correctness of the court's decision this Court must assume, as did the court below, that the contentions of the appellants in this respect are correct and could be so established at a trial on the merits.*

Appellants claim that under the decisions of the Supreme Court in *Armour & Company v. Wantock, et al.*, 323 U. S. 126, 89 L. Ed. 118, and *Skidmore v. Swift & Company*, 323 U. S. 134, 89 L. Ed. 124, and the subsequent decisions, their being required to remain upon the appellee's premises constituted an employment restraint which entitled them to time and half; in other words, that while they were paid their salaries for the duties they performed for the Company in their eight-hour shift, they are entitled to time and a half for the remaining sixteen hours of the day in which they lived upon the company's premises waiting to be employed in the event of an emergency. As pointed out in our opening brief, while there was no question that on occasions appellants were called out several times a night, the records of the call-out times of all the resident employees showed, without being controverted, that over the period of a year, the average of the call-out times was only one for every 15½ days.

The one and only question involved in this case is: *Under the Portal Act are the appellants entitled to recover for the time in which they lived upon the appellee's prem-*

ises waiting to be employed in case their services were needed for an emergency?

Prior to *Armour & Company v. Wantock, et al.*, and *Skidmore v. Swift & Company, supra*, it had not occurred to anyone that the waiting time of these various classes of employees might be claimed to be compensable. As a result of the above decisions and others further extending them, culminating in *Anderson v. Mount Clemens Pottery Co.*, 328 U. S. 680, 90 L. Ed. 1515, the country became flooded with billions of dollars' worth of claims which threatened the bankruptcy of industry and the demolition of our entire financial structure. As we pointed out in our opening brief, it was in part to outlaw suits for this character of waiting time that the Portal Act was passed.

In the debates on the Conference Report which we set out in our brief (page 27) to which the appellants have not replied, because they cannot, it is shown that Congress had this exact situation in mind and expressly intended to bar recovery for them. (See 93 Cong. Rec. 4515 (May 1, 1947); Ap. 4-14.)

We have made this brief recapitulation of the undisputed factual situation and our contentions because with it in mind the inapplicability of the cases cited in appellants' numerous letters becomes self-apparent.

II.

Cases Cited by Appellants' Letters Since Submission
of the Case.

In their various letters since the submission of the case appellants have cited the following cases:

Manosky v. Bethlehem-Hingham Shipyard, Inc.,
177 F. 2d 529;

Knudsen v. Lee & Simmons, 89 Fed. Supp. 400;

Colby v. Klune, 178 F. 2d 872;

Tobin v. Alma Mills, 9 W. H. Cases 563;

Thompson v. Stock & Sons, Inc., 9 W. H. Cases
585.

An examination of the cases will show that apparently the only reason for their being called to the attention of the Court is that in them employees prevailed.

In the first case cited, *Manosky, et al., v. Bethlehem-Hingham Shipyard, Inc.* (1st Cir., Nov. 9, 1949), 177 F. 2d 529, the action was to recover overtime compensation. The District Court granted defendant's motion to dismiss and plaintiffs appealed.

The complaint alleged that plaintiffs, who were mechanics, worked in excess of forty hours per week without receiving any compensation therefor. While the action was pending, the Portal Act was passed and defendant moved to dismiss. Plaintiffs then amended the complaint to allege that the work was compensable by an express provision of a written or non-written contract or by custom and practice, all during the portions of the days with respect to which they were made so compensable within the meaning of Sections 2 (a) and (b) of the Portal Act. Defendant again successfully moved to dismiss on the

ground of (1) failure to state a claim, and (2) failure to state facts giving the court jurisdiction.

In reversing the judgment of the District Court, the Court of Appeals held that plaintiffs need not set forth the specific activities for which they sought overtime compensation nor the express provision of a contract or custom rendering such activities compensable. The court also pointed out that the complaint appeared to state a claim for excess hours put in by plaintiffs in their principal productive activity as mechanics, saying:

“Reading the complaint in the case at bar, we find nothing to indicate that plaintiffs were seeking to recover overtime compensation for travel time to or from the place of performance of their principal activity as mechanics, or for activities, such as washing up or changing clothes, which are preliminary or postliminary to said principal activity. It strikes us that the plaintiffs have been trying all along to state a claim for statutory overtime compensation for excess hours put in by them in their principal productive activity as mechanics, which activity would certainly be compensable under the prevailing collective bargaining agreement. * * *

Manosky v. Bethlehem-Hingham Shipyard, Inc.,
177 F. 2d 529, 533, 534.

It is evident that the decision does not bear on the merits of the question involved in these appeals, but with the sufficiency of the complaint as showing the appellant employees to be within the exception of the Portal Act. While it is in conflict with a great number of cases cited in the appendix to our brief holding that it is necessary that a complaint show the precise services for which overtime is sought and that they were compensable either by express

provision of a contract or by custom or practice, if the cited decision were conceded to be correct it could afford the appellants no comfort.

The judgment of dismissal in the instant cases was not granted on the insufficiency of the complaint but because on the entire record it was established by the appellants as well as by appellee that for all the services performed between shifts they were paid overtime, and that the only basis upon which recovery was sought was for their living time upon defendant's premises. That recovery for such time was clearly intended to be outlawed by the Portal Act unless it was made compensable by a direct provision of a contract or by custom or practice, cannot be denied. The case cited contains no indication to the contrary.

In the second case cited, *Knudsen v. Lee & Simmons* (D. C. S. D. N. Y., Sept. 23, 1949), 89 Fed. Supp. 400 (rehearing denied), action was brought in 1943 against a lighterage firm to recover overtime pay and liquidated damages under the Act. After certain preliminary motions, rulings and appeals and after the passage of the Portal Act, defendant filed a supplemental answer setting up defenses under that Act. Among these defenses were (1) that the action was barred by Section 2(a) of the Portal Statute inasmuch as neither overtime nor any activity of plaintiff's was compensable according to custom, practice or by express contract, and (2) that for the same reason the court was without jurisdiction under Section 2(d).

The action was tried on the merits, and with respect to the claim that the overtime was not compensable by custom, practice or contract, the court stated that it was evident from the record that plaintiffs had worked over forty hours a week for numerous weeks during the period in

question. The court then held that on the record it was necessary to assume that the claim was for hours worked in regular employment at the behest of the employer, which of course would not be affected by the Portal Act. In this respect the court said:

“Plaintiffs are not seeking payment for activities which were not thought compensable before the *Anderson v. Mt. Clemens Pottery Co.* (328 U. S. 680 [11 Labor Cases, Par. 51,233], 1946) decision. *It is these newly perceived claims which Section 2 sought to eliminate and not those based, as here, on working time which always heretofore had been paid for.* *Michigan Window Cleaning Co. v. Martino*, 173 F. (2d) 466 * * * 6th Cir. 1949.”

Knudsen v. Lee & Simmons, 89 Fed. Supp. 400, 406.

Comment on the inapplicability of the above case to the question involved in this case as to whether recovery can be had for the time spent in living on appellee's premises would seem unnecessary.

The third case cited, *Colby v. Klune, et al.* (2nd Cir., Dec. 27, 1949), 178 F. 2d 872, 873-4, does not involve the Fair Labor Standards Act. It was a stockholders' derivative action for secret profits. The appeal was from a summary judgment and was reversed upon the ground that there was a disputed issue of fact which should not have been resolved except on a trial on the merits, the court saying, in part:

“* * *, we think that the plaintiff should be allowed at a trial to produce oral testimony in open court (by examination or cross-examination of witnesses), or other evidence, relevant under the foregoing definition of officer.”

* * * * *

“The statements in defendants’ affidavits certainly do not suffice, because their acceptance as proof depends on credibility; and—absent an unequivocal waiver of a trial on oral testimony—credibility ought not, when witnesses are available, be determined by mere paper affirmations or denials that inherently lack the important element of witness’ demeanor. * * *”

Colby v. Klune, 178 F. 2d 872, 873-4.

This decision would be applicable if the issues on which there was a controversy between the parties were at all material to the question of the court’s jurisdiction of the subject matter of the actions. Since, as we have shown, the only factual issues on which there was any dispute were entirely immaterial to that question, the principle of the above case has no application. We have always conceded—and it would be unavailing if we had not—that where there is a substantial dispute on a material issue there must be a trial on the merits.

The purpose of a trial on the merits of a disputed factual issue is to afford the fullest opportunity to the parties to present all of the evidence available to them and to afford them and the court the opportunity of having the witnesses personally before the court, where their appearance can be obtained, and subject to cross-examination. In the instant case no trial on the merits, no matter how protracted, could change the basic factual situation established by both parties, viz., that regardless of whether the normal working or shift hours of the employees were fully occupied or only partially so, that between those hours they could indulge in any pursuit they saw fit, and performed no services for the appellee unless called on in the event of an emergency, in which event they were paid time and a half for their services, the

amount being computed on the basis of their salary paid for forty hours of work per week. No trial, however protracted, could change the basic fact that appellants were not paid anything but their salary except their overtime for emergency services; that they made out their own time-cards and did not claim any overtime for their living time which they spent upon appellee's premises waiting to be employed in case of an emergency. Since that factual situation divested the court below of jurisdiction, the judgments of dismissal must be affirmed.

The fourth case cited, *Tobin v. Alma Mills* (U. S. D. C. W. D. So. Carolina, Sept. 8, 1950), 9 W. H. Cases 563, is clearly inapplicable to the instant appeals.

As we interpret the appellants' transmitting letter, the case is cited as sustaining the proposition that employees can recover overtime for activities performed prior to the Portal Act during portions of the day in which they were not made compensable by contract, custom or practice. The decision does not so hold and it would be erroneous if it did. It deals entirely with services performed subsequent to the date of the Portal Act.

In the *Tobin* case the administrator in 1938 had obtained an injunction against defendant violating the act and in 1949 the defendant moved to vacate the judgment and the present action was then commenced by petition of plaintiff to have the defendant company held in contempt.

At the hearing on the petition defendant's employees testified that from 1946 to 1949 they came to work prior to their shift and performed clean-up activities (duties which they were supposed to perform on their regular shift) in order that their regular duties would be easier.

They expected no compensation. It was stipulated that there was no contract, custom or practice which provided for compensation for those pre-shift time services; the last sentence of the stipulation reading: "That applies for the period subsequent to May 27, 1947."

Defendant contended that this stipulation barred the contempt action on the ground that the pre-shift activities were not compensable by contract, custom or practice, relying upon Sections 2a and 4b of the act. The court rejected this contention and held that where "principal activities" are performed prior to the commencement of the regular shift the Portal Act does not apply, citing Title 29, Code of Federal Regulations, 1947 Supp. pages 4401 and 4413 (Sec. 790.8), relating to Section 4 of the Portal Act. That section unlike Section 2 (which governs violations prior to the date of the act) is specifically limited to "activities which are preliminary to or postliminary to said principal activity or activities." These regulations and also the portion of the President's message referred to in the opinion emphasized that "principal activities" include any work of consequence performed for the employer and that such work does not fall within the purview of the act excluding certain "preliminary" and "postliminary" activities.

As we interpret the decision, it was rendered with reference to services performed subsequent to the Portal Act. This must be so since the Court held that recovery for all services performed prior to 1948 was barred by the statute of limitations.

Thus the decision can have no application to a recovery sought for services performed prior to the Portal Act. It would be inappropriate to attempt to discuss whether the

decision (which was by a district court and therefore not binding on this Court) was correct as to services performed subsequent to the Act. That question is not involved in these appeals. Assuming for the sake of the argument, without so conceding, that as to services subsequent to the Act the decision is correct, it is inapplicable to the present situation for two separate reasons, the first of which is, that appellants seek recovery for on call time prior to the Act.

It is quite evident that Congress intended to make a difference between future services and past services. Otherwise there would have been no possible reason for treating those services in different sections of the act. The philosophy of Congress is quite apparent. As to future services it felt it would so clarify the act that there could be no possible ambiguity as to what services the employer would be liable for overtime compensation.

As to past services, Congress evidently thought that it was obviously unfair to require industry to pay overtime for services, regardless of their character, which neither industry nor labor had regarded as compensable and which had been required and rendered without any expectation of being paid for. Hence, in addition to the clear mandate of Section 2. that no act should be compensable that was not made so by an express provision of contract or by custom or practice, it added subsection (b) as follows:

“(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.”

In the conference report, it is said with reference to that:

“The conference agreement (section 2(b)) contains a provision not stated expressly in either bill, that an activity shall be considered as compensable under the above referred to contract provision or custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable. Under this provision, for example, if under the contract provision or custom or practice an activity was compensable only when engaged in between 8 and 5 o'clock but was not compensable when engaged in before 8 or after 5 o'clock, it will not be considered as a compensable activity when engaged in before 8 or after 5 o'clock. So also, if under the contract provision or custom or practice an activity was compensable when engaged in before 8 but was not compensable when engaged in after 5 o'clock, it will not be compensable under the bill as agreed to in conference when engaged in after 5 o'clock. So also, if under the contract provision or custom or practice an activity was compensable during a certain portion of the regular workday but was not compensable when engaged in during other hours of the regular workday, it will not be compensable under the bill as agreed to in conference when engaged in during such other hours.”

Conference Report No. 326 H. R., 80th Congress,
1st Session April 29, 1947, pages 9-10.

Hence, to hold that services performed before the Portal Act are compensable because they are of the same character as the principal activities of the employee, where the services are performed at a time in which they are not made compensable by the express provisions of a contract, or by custom or practice, is to disregard not

only the clear language of the statute but the manifest intent of Congress; to give the act the directly opposite construction from that intended and to perpetuate the very abuses which Congress intended to eliminate.

This is clearly pointed out by Judge Follmer in his opinion in *Welsh v. Dillner Transfer Co.* (W. D. Pa.), 9 W. H. Cases 502.

The second equally conclusive reason why the *Tobin* decision is not applicable to the instant appeal is that there is no logical similarity between the appellants' principal activities which were performed for the company during their normal working or shift hours and their 16 hours of living time upon its premises.

During the sixteen hours of living time they performed no active services for the Company whatever unless called upon to respond to an emergency.

During their normal working hours they performed various services in the way of care and inspection of equipment, oiling, etc., for which they were employed on a monthly salary based upon forty hours of work a week.

Appellants claim that their services occupied their entire time during their normal working hours, and that if there happened to be any leisure they could not employ it for personal pursuits, as they were required to still remain at their various stations. Certainly, assuming their claim is correct, their activities during their normal working hours have no resemblance to their waiting time during the sixteen hours which they could spend in their homes and with their families after their shift or normal working time.

Appellee, however, claims that their active duties took only a small fraction of their normal working hours, and

that the remainder of those normal working hours they could utilize as they pleased. Even if appellants were to concede this claim, and that their normal working hours or their shift time contained many hours in which they performed no services, their position would not be improved. The sixteen hours of living time between their shift hours or normal working hours were in that part of the day in which any activities on their part were not made compensable by contract, custom or practice. Indeed, the appellants' record shows that except for the overtime paid for emergency services between the normal work or shift hours they were paid nothing but their monthly salary *which was for a forty hour week*, and in making out their timecards appellants made no claim for overtime for those sixteen hours a day, claiming overtime only for answering emergency calls during those sixteen hours. Thus, it is certain not only that there was no showing that the sixteen hours' living time which they could spend in their homes and with their families was made compensable by contract, custom or practice, but it affirmatively appeared that the contract, custom and practice was that such living time *was not to be paid for*. That being so, any claim for compensation for their living time as standby time was barred clearly by the provisions of subsection (b) of Section 2.

That such is the effect of the section is clear not only from its unambiguous language but also from the report of the Conference upon its applicability. It is also perfectly certain that in writing subsection (b) into the statute, Congress had in mind claims of the precise character of those here advanced, and definitely intended to outlaw them. At the danger of undue repetition, we again quote the debate in the House upon this section as affecting claims of this character.

93 Cong. Rec. 4515 (May 1, 1947):

“Mr. Hinshaw. The gentleman remembers the cases known as the stand-by cases which were brought out before his committee in which certain employees might be called upon at some time not during their regular working time to perform some duty and that many suits for wages have been instituted under that type of claim. Is that provided for in the present bill?

“Mr. Walter. Yes; we feel that under the language of section 2(b) of this bill that type of arrangement is covered and that the employer is not liable.

“Mr. Hinshaw. The case I had in mind was one where there were certain persons who were left to guard electrical distribution stations where they were given a house and so forth and perhaps performed one or two labors per day and yet were paid on a monthly basis. Large suits were brought for time and a half for an additional 8 hours per day pursuant to the ruling of the court.

“Mr. Walter. We hope that we have met that situation and all of the situations that have been brought to our attention, because we had in mind that all of these portal-to-portal suits are in the nature of windfalls. None of the plaintiffs—and I say that advisedly—ever felt they were entitled to compensation for activities which are the basis of these suits. I think I should add to what I said about the defense of good faith.”

Although the above is quoted on pages 27 and 28 of our opening brief, and again on pages 4 and 5 of our appendix, we have received no reply thereto or comment thereon by appellants either in their brief or at their oral argument. The reason is perfectly obvious—there is none.

Of course, nothing is better or more firmly settled than that the sole function of a court in construing a statute is to effectuate the legislative intent. As well stated by this Court:

“It is our duty to look to the language employed and the legislative history and ‘to construe the language so as to give effect to the intent of Congress.’
* * *.”

Northwestern Mutual Fire Ass’n v. Commissioner of Internal Revenue, 181 F. 2d 133, 135.

See, to the same effect:

MacKenzie v. Hare, 239 U. S. 299, 308;

Bank v. Sherman, 101 U. S. 403, 406;

Matson Navigation Co. v. United States, 284 U. S. 352, 356;

United States v. Missouri Pacific Railroad Co., 278 U. S. 269, 278.

In the last case cited, the Supreme Court of the United States tersely observed:

“Construction may not be substituted for legislation. * * *.”

United States v. Missouri Pacific Railroad Co., 278 U. S. 269, 278.

“As the words of the section are plain, we are not at liberty to add to or alter them to effect a purpose which does not appear on its face or from its legislative history * * *.”

Matson Navigation Co. v. United States, 284 U. S. 352, 356.

There is no case of which we are advised that holds that an activity performed prior to the portal act is com-

pensable when performed at a time that it is not made so by a direct provision of contract or custom, merely because it is the same or similar to the main activities of the employees. There is language in some of the decisions that may give some support to such contention, but not when considered with reference to the factual situation discussed. This is illustrated by the next and last case cited.

Thompson v. Stock & Sons, Inc. (D. C. Mich., 1950), 9 W. H. Cases 585. This case, as we read it, involved the question of whether the employees could recover for their lunch time. Defendant contended that under the Portal Act they could not recover for services performed during that time. To fully summarize the facts would be rather long and is unnecessary for succinctly the question was this: The employees were not permitted during their lunch hour to leave their machines and while eating lunch were required to perform their ordinary duties. Thus, in part, the Court said:

“* * * It would serve no useful purpose here to set out the well-known provisions of the Act or its legislative history which followed *Anderson, et al. v. Mt. Clements Pottery Co.*, 328 U. S. 680 [6 WH Cases 83]. The defendant's president and bookkeeper expressed accord with the position of the plaintiffs that the defendant company was by the contract of employment required to pay for all working time and overtime compensation for all hours worked in excess of the statutory maximum. The Court having found that these employees are basing their claims for compensation for the usual activities performed during all the time they were in their respective shifts and that the so-called lunch period was, in fact, working time covered by the contract of employment, the claims are not barred by the Portal-

to-Portal Act. The provisions of the Act were never intended to bar recovery under facts similar to those found in this case. Compare *Central Missouri Telephone Co. v. Conwell*, 170 F. 2d 641 [8 WH Cases 353]. See also *Michigan Window Cleaning Co. v. Martino, et al.* (6 Cir. 173 F. 2d 466 [8 WH Cases 639]); *Smith et al. v. Cleveland Pneumatic Tool Co.* (6 Cir.), 173 F. 2d 775 [8 WH Cases 750].”

Thompson v. Stock & Sons, Inc., 9 W. H. Cases 585, 587, 588.

The case is very similar factually and in principle to the case of *Biggs v. Joshua Hendy Corp.*, decided June 28, 1950, 183 F. 2d 515, 520. That was an action to recover overtime compensation for work performed during lunch periods. The trial court awarded recovery for each lunch period worked on the day shift, but denied recovery for the same on swing or graveyard shifts on the basis of certain premium payments not here material. Certain of the plaintiffs appealed and defendant cross-appealed, the latter urging, among other things (1) that the work was not compensable under any contract, and (2) that remaining on call did not constitute compensable work. This court rejected the contention, saying:

“Cross-appellants further contend that work performed by appellants during lunch periods cannot be the basis for recovery under the Fair Labor Standards Act by reason of §2 of the Portal-to-Portal Act, 29 U. S. C. A., §252, because such work is not made compensable by the express provision of a contract within the meaning of §2(a) (1). That section is directed against claims for compensation for activities, such as dressing for work, traveling within the plant to the job location, etc., which are different from the activities which comprise the regular, nor-

mal part of the employment. The section has no application where, as here, the work for which compensation is being claimed is the same kind of work as was performed throughout the remainder of the workweek.

“Appellee’s final contention on cross-appeal is that there is insufficient evidence to support the finding of the trial court that appellant Biggs worked during all of his lunch periods. We think the evidence sustains the finding. He was on call at all times and time thus spent was compensable under the Fair Labor Standards Act. *Armour & Co. v. Wantock*, 1944, 323 U. S. 126, 65 S. Ct. 165, 89 L. Ed. 118; *Skidmore v. Swift & Co.*, 1944, 323 U. S. 134, 65 S. Ct. 161, 89 L. Ed. 124.”

Biggs v. Joshua Hendy Corp., 183 F. 2d 515, 520.

We have never understood that such a literal interpretation should be given to the Portal Act as to enable the employer to require a continuous service of his employees’ principal activities for more than forty hours a week and not pay them overtime for the excess by camouflaging it so that excess work was performed during the lunch hour or other apparent lay-off times.

Ordinarily it must be conceded that a lunch time is not compensable because an employee, whether required to remain on the premises, or otherwise, is free for whatever period it is,—half an hour to an hour,—not only to partake of his lunch but to do whatever else he pleases, but when during that lunch hour he is required to attend his regular principal activities, consuming his food as he can between the performance of such work, the lunch hour period, of course, should be compensable, and we believe that within the actual wording of the Act, as well as with-

in its spirit, the services performed therein are compensable within the time within which they are made so by the custom or contract of employment. Certainly where the employee is required to continue his main activities through his lunch hour, sandwiching his food between the performance of those duties, in both the letter and spirit of the Portal Act they should be considered as performed within a time made compensable by either contract or custom.

To illustrate: If an employee is employed principally to perform certain services between the hours of eight and five, with one hour out for lunch, those services, of whatever kind or nature they are, are made compensable by either contract or by custom or practice between the hours of eight and five, and if they are to be performed during an hour which is designated as a "lunch" hour but in which the employee is actually required to continue to perform his services, they are clearly rendered within the time for which contract, custom or practice makes them compensable. We believe that this is the principle underlying the decisions of the district and appellate courts in *Conzwell v. Central Missouri Telephone Company*.

In the *Conzwell* case, as pointed out in our opening brief, the telephone operators were required to be on continuous duty for eleven hours a day and were paid for eight. A portion of the time was called "sleeping time," in which they could leave their stools and lie down to sleep if they did not have to answer their switchboards, but they had to be at all times, even during the so-called sleeping hours, responsive to the switchboards, just the same as when on their so-called duty time. When they asked for an increase in wages, instead of giving them more money the Company simply cut down the so-called "sleeping time."

We submit there is no similarity between the *Conwell* and lunch hour situations and that requiring an employee after his normal hours of work or a definite eight-hour shift to live upon the premises so as to be available if his services became necessary in case of an emergency, in which event they were paid for the time given to answering that emergency.

The district court in the *Conwell* case pointed out the difference between the situation of the plaintiffs in that case and a telephone operator who was permitted after the end of her shift to go to her home where she could attend to her own duties but was occasionally required to answer telephone calls, pointing out that as to such a situation the time at her home was not compensable under the Portal Act where not made so by contract, custom or practice.

In the instant cases, the employees, whenever they perform any service outside shift hours, were paid overtime therefor. As we have so often pointed out, the sixteen hours a day during which the resident employees lived upon the appellee's premises with their families, pursuing any personal vocation they desired that they could engage in upon the premises, is clearly not performing services similar to their main activities. Again, we emphasize, that when their living hours were interrupted by performing such services because of an emergency they were paid overtime for those services.

Clearly their action is for their living time in which they were performing no services other than being available for call in case of an emergency. It is undeniable that the Portal Act was designed to render such activities non-compensable and to terminate all litigation therefor by depriving the court of jurisdiction of an action founded upon such services.

III.

Decisions Rendered Since the Submission of These Appeals Supporting Appellee's Contention.

Galvin, et al. v. National Biscuit Co. (U. S. D. C. N. Y., 1949), 82 Fed. Supp. 535, 536 (approved by the Second Circuit Court of Appeals), was an action for overtime compensation, defendant moving to dismiss for lack of jurisdiction or in the alternative for summary judgment, on the ground that the claim was barred by the Portal Act. Plaintiff relied upon the following allegations:

“(1) From and after November 1, 1944, the union agreements here involved provided that, ‘The parties have agreed that fifteen minutes per day constitutes the reasonable average time consumed by the employees in changing to and from working clothes and that such time shall be included in hours of work and compensated as such’. (2) More than 15 minutes per day is needed and is actually used for clothes-changing. (3) The quoted provision of the union agreement was intended to include all preliminary and postliminary activities, not only clothes-changing. (4) These activities required more than 15 minutes. (5) Both before and after Nov. 1, 1944, employees were regularly released from their productive activity five minutes earlier than the scheduled hour, during which time they engaged in postliminary activities such as washing. (6) These activities required more than 5 minutes.”

Galvin, et al. v. National Biscuit Co. (D. C. N. Y., 1949), 82 Fed. Supp. 535, 536.

The Court stated the questions thus presented as follows:

“Assuming plaintiffs’ allegations of fact to be true, two questions are presented:

“(1) where a postliminary activity was made compensable by custom but only when engaged in during a specified period of the shift—here the last five minutes—did the time spent in that activity outside of that period thereby become compensable?”

“(2) where a preliminary or postliminary activity was by contract made compensable for a specified length of time (here 15 minutes for clothes-changing), did any time spent in that activity in excess of the specified length of time thereby become compensable?”

With respect to the first question, the Court, after quoting from Conference Report, H. R. Rep. No. 326, 80th Cong., 1st Session, April 29, 1947, to the effect that if under the contract provisions or custom or practice the activity was compensable only when engaged in between 8:00 and 5:00 o'clock but was not compensable before 8:00 or after 5:00 o'clock it will be not considered compensable when engaged in before 8:00 or after 5:00 o'clock, said (the italics are ours):

“In the light of the illustration contained in the Conference report, the first question here presented must be answered in the negative. Insofar as plaintiffs' claim is based on the allegation that both before and after the 1944 contract it was the custom to allow employees to suspend five minutes before the end of the shift for postliminary activities such as washing up, it is clearly proscribed by the statute.”

With respect to the second question, the Court said:

“The statute was designed to relieve employers of the obligation to pay for time spent in so called portal-to-portal, non-productive activities which neither they nor their employees had theretofore considered by cus-

tom or contract to be compensable. I do not find in the Act the intention that a promise by the employer to pay for fifteen minutes of clothes-changing time, for which he would not be compelled by statute to pay, absent the promise, should impose liability for thirty minutes or more. Such a construction of the statute, if applied to post Portal-to-Portal Act activities (the relevant provisions of the Act are similar; compare 29 U.S.C.A. §252(b), (c) with 29 U.S.C.A. §254(c), (d) tends to remove preliminary and postliminary activities from the sphere of collective bargaining.

“I recognize that a certain literal difficulty remains. Neither contract nor custom can open an avenue of escape from the obligations imposed by the Fair Labor Standards Act, 29 U.S.C.A. §201 *et seq.* A contract may not validly dictate that eight hours work shall be calculated as seven hours. *But in the construction of the statute common sense is not outlawed.* At least with respect to the kind of activity which the Portal-to-Portal cases brought to the attention of Congress and which generated the Congressional will to enact §2 of the Portal-to-Portal Act (see 29 U.S.C.A. §251 and §254) it seems plausible that when Congress hinged liability on contract or custom it meant to say that employers and employees were free to contract or agree. * * *

Galvin v. National Biscuit Co., 82 Fed. Supp. 535, 537.

The plaintiffs' appeal was dismissed because of their failure to file the record supporting the same within the time provided. However, in so doing, the appellate court went out of its way to approve the opinion of the court below, saying:

“ . . . We are satisfied that the plaintiffs have shown no merit in their claims. Accordingly the

appeal is dismissed because it involves no substantial question of law or fact for the reasons given by Judge Rifkind in *Galvin v. National Biscuit Co.*, D. C., 82 F. Supp. 535.”

Galvin v. National Biscuit Co. (2nd Cir. C. C. A.),
177 F. 2d 963, 964.

In *Bumpus v. Remington Arms Co., Inc.* (8th Cir., July 6, 1950), 183 F. 2d 507, in sustaining the dismissal of an action to recover for overtime activities because of lack of jurisdiction by virtue of the Portal Act, the Court said:

“ . . . we must assume that the definition of ‘actual working time’ is not affected by the time card situation. The assumption is necessary since appellant has the burden of clearly stating and proving herself within an exception of the Portal to Portal Act in order to sustain the Jurisdiction of the Court.”

Bumpus v. Remington Arms Co., Inc., 183 F. 2d
507, 509, 510, 513.

In that case it was held that the written contract was so clear that the services for which overtime compensation were sought were not made compensable that it negated any claim of custom or practice. In the instant cases, the custom and practice as shown by the appellants themselves of not receiving any overtime for the sixteen hours of living time which they could spend with their homes and with their families upon the appellee’s premises negatives the fact that Bulletin A-36 was ever intended or understood as promising overtime except for actual services performed in answer to an emergency.

Indeed, it is clearly shown that it was the custom and practice from the inception of the employment of these

appellants and all other similar employees that they received a monthly salary for forty hours of work a week, and received *no other compensation* except overtime when they responded to an emergency call outside of their normal working hours. *In other words, the custom and practice was clear that there was no compensation for their living time.*

For the reasons heretofore set forth and set out in our brief we respectfully submit that the judgments in each case must be affirmed.

All of which is respectfully submitted.

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STATEMENT OF FACTS ESTABLISHED BY APPELLANTS.

(Ap. refers to Appendix of our Original Brief. All italics in quotations are ours.)

Pleading.

R. 107-8. Third Amended Complaint, Par. IV:

“That plaintiffs at all times mentioned in this action were employed by defendant under an express provision of an oral and written agreement in effect during all of the time of their employment; that pursuant to said agreement, *plaintiffs were employed at a stipulated monthly salary based on 40 hours of work each week* and were to receive in addition thereto, additional compensation at one and one-half times their regular hourly rate for all hours *worked* in excess of forty hours in each work week during the period covered by this action, *but did not receive the compensation required by the Acts*, although all of said work time and overtime was compensable under said agreement and said Acts.” [R. 107-8, Third Amended Complaint, par. IV.]

Affidavits.

“The plaintiffs who were substation operators and attendants were required as a condition of their employment to live * * * on the premises * * * in houses rented from the defendant * * *.” [R. 114, affidavit in support of motion for partial judgment.]

“* * * There were eight hours each day when the employees were required to take readings and stay at the substation proper on company duty. * * *” [R. 305, affidavit of plaintiff substation operators.]

“* * * *After eight hours the substation operators considered themselves free from routine duties but understood that they were still, for the balance of the 24-hour work day, in the employ of the defendant company.*” [R. 304, affidavit of substation operators.]

“With respect to the failure of the plaintiffs to place on their time records the remaining sixteen hours each day as overtime, affiants state that the defendant’s officers and agents informed employees not to put down such time on the time record.” [R. 305, affidavit of substation operators.)

“All of the plaintiffs who were primary service men were paid a semi-monthly salary which was computed on the basis of forty hours a week and it was agreed by defendant in its order A-36 that these plaintiffs would receive time and a half for all hours worked in excess of forty hours each work week, in addition

to their salary. * * * *defendant paid these plaintiffs only their salary and time and a half for the actual time consumed when called out for emergency service on stand-by time.*" [R. 309-310, affidavit of primary service men.]

"The plaintiffs herein were paid for only forty hours per week together with the emergency callouts above referred to, except during the period of War Manpower Regulations when they received 8 hours overtime for the sixth day of work in the work week. *For the balance of the time spent in waiting for emergency callouts and in the performance of various routine duties such as turning on street lights, checking peak loads, resetting alarms, and answering telephones plaintiffs did not receive compensation . . .*" [R. 120, appellants' affidavit in support of motion for partial summary judgment.]

Interrogatories.

Defendant's Interrogatory No. 60 to Substation Operators and Attendants and Answer.

Interrogatory No. 60:

“From and after March 19, 1942, did plaintiffs or any of them receive any compensation other than their monthly or weekly salary for being required during five days a week (and six days a week when the Substation Division was operating upon a 48-hour week) to remain so near to the substation or their residence as to be able to hear and respond to an alarm bell in case their services were needed?” [R. 272.] Answer: “No.” [R. 323.]

Answer of Hydro Appellants to Interrogatories.

“* * * generally the men were in the Hydro stations between 8:00 a. m. and 4:00 p. m. and thereafter were required to remain in and about the grounds or the home or relief quarters to answer calls and emergencies.” [R. 313.]

“These plaintiffs were on a semi-monthly salary and did not receive any compensation other than the salary and time and a half for all hours reported by them in excess of forty hours per week; * * * defendant instructed these plaintiffs not to put down on their time records more than eight hours per day and time spent on emergency call-outs. * * *” [R. p. 311.]

*Defendant's Interrogatory No. 19 to Primary Servicemen
and Answer.*

Interrogatory No. 19:

“Have the plaintiffs Paul W. Cockrell, J. D. Borden, A. L. Honnell and Clarence C. Prinslow, or any of them, ever made any demand, oral or written (other than bringing or joining in this suit), upon the defendant for the payment of any amount because of being required on certain days of the week, in case they did not go home (338) after the end of their shift, or after going home left their homes, to advise the switching center of a telephone number where they could be reached in case their services were needed in the event of an emergency?” [R. 263.]

Answer:

“No formal demand was made although the plaintiffs continually complained about the failure of the defendant to pay such overtime. *All of the plaintiffs were instructed not to turn in any record on their time cards, time sheets or other records, showing the standby time.*” [R. 321.]

Depositions.

(The following excerpts, which we believe highlight the factual situation outlined in the brief, are extracted from longer and more extensive quotations from appellants' depositions set forth in the Appendix to our main brief).

SUBSTATION OPERATORS AND ATTENDANTS

H. L. ANDERSON:

"Q. Do I understand that it is your estimate that on an average you spent eight hours a day in active work of that kind? A. That is right." (Dep. p. 9 lines 4/7, Ap. 35.)

* * * * *

"A. I was paid a monthly wage, which was based on an hourly rate. That hourly rate was derived from the number of working days in the month, and that was computed in a 40-hour work week." (Dep. p. 10, lines 1/4, Ap. 36.)

* * * * *

"Q. Did you normally spend your evenings with your family while you were at the substation? A. Did I?

Q. Yes. A. Yes." (Dep. p. 28, lines 12/16, Ap. 41.)

Cross-Examination (By Mr. Sokol)

"Q. Did you ever put down this stand-by time when you were waiting to do your work? A. No, I did not.

Q. Why not? A. It wouldn't have been allowed to go through." (Dep. p. 33, lines 5/9, Ap. 42.)

EUGENE L. ELLINGFORD:

“Q. Did you make regular time reports while you were acting as a station attendant at Los Alamitos and Anita? A. What do you mean?

Q. Did you have any time record that you made out? A. Yes. We call in at 8:00 o'clock, and took readings from 8:00 to 12:00 and 2:00 to 6:00.

Q. Did you make any daily record for the report of your time worked? A. We had what we called daily time sheets at that time. In other words, it was made out each day.

Q. I see; and what did you show on that? A. *Eight hours a day.*” (Dep. pp. 14-15, lines 16/1, Ap. 51.)

“Q. Were you paid while you were at Los Alamitos and Anita, were you paid overtime for any work of any kind? A. *Emergency operating only.*” (Dep. p. 12, lines 20/22, Ap. 49.)

“Q. Did you ever put down your stand-by time after 6:00 o'clock, I mean, on this sheet? A. *No. They told me not to.*

Q. Who told you not to? A. *Every chief clerk of every division I have worked in. They said stand-by time was not allowed.*” (Emphasis added.) (Dep. p. 42, lines 15/20, Ap. 54.)

VERNON B. WERT:

“Q. Eight hours? A. Yes.

Q. You put that down regardless of whether you worked more or less than that time, do you? A. *Oh, no, if we work more than eight hours, why, then, we put in for overtime for that.* That goes in a dif-

ferent section of the time sheet.” (Emphasis added.)
(Dep. pp. 9-10, lines 24/4, Ap. 70.)

“Q. What if you work less than eight hours; what do you do then? A. *We put in eight hours.*”
(Dep. p. 10, lines 7/9, Ap. 71.)

* * * * *

“Q. In receiving your pay, then, you considered that you were receiving pay for eight hours a day? A. That is right.” (Dep. p. 38, lines 20/22, Ap. 77.)

“Q. In computing the overtime that you were paid—you were paid some overtime; is that correct? A. Yes.

Q. In computing that, was that based upon an 8-hour day, five days a week when you were working five days a week? A. *Based on a 40-hour week, yes.*

Q. It was based on a 40-hour week? A. *Yes.*”
(Dep. p. 41, lines 19/26, Ap. 78.)

“Q. Did you ever receive any pay for the stand-by time? A. Not as such.” (Dep. p. 42, lines 17/18, Ap. 78.)

“Q. But at any time have you ever been paid anything outside of your regular monthly salary for being on call? A. *No; I never received anything for being on call.*” (Dep. p. 51, lines 12/14, Ap. 79.)

“Q. And that your monthly rate was broken down to give you an hourly rate based on 40 hours a week. Is that correct? A. Our monthly wage was broken down to show the hourly rate that we earned in that month, yes.

Q. Based upon 40 hours in the week? A. That is right.

Q. It was not based upon 24 hours in a day, was it? A. *It never has been.*

Q. It was based upon eight hours a day, five days a week, or 40 hours a week. Is that correct? A. That's correct." (Dep. pp. 54-55, lines 20/4, Ap. 80.)

HYDRO DIVISION EMPLOYEES

Hydro Station Attendants

M. E. ROACH:

"Q. What were your hours supposed to be? A. 7:30 to 4:30 with an hour for lunch.

* * * * *

Q. Well, you are suing for a claim of overtime which you haven't been paid for. On what do you base that claim? A. *I call it standby time.*

Q. Well, tell me on what you base that. A. I was there on the property. I had to live on the property. I couldn't go and come as I pleased." (Dep. p. 8, lines 14/23, Ap. 81-82.)

"Q. When did they first start paying you any overtime? A. June of '41, I believe * * *

* * * * *

Q. What did they pay overtime for? A. *For the time that you were called out.*

Q. After normal hours? A. *After 4:30 in the evening, or before 7:30 in the morning.*" (Dep. p. 12, lines 4/15, Ap. 83.)

“Q. Now, since then you have been paid overtime for any active duty that you performed after 4:30; that is, while you were in this position? A. As far as I know, I was.

Q. Who kept your time sheets? A. I kept my own.” (Dep. p. 13, lines 20/25, Ap. 83.)

“Q. Did your family live with you? A. Yes.” (Dep. p. 15, lines 13/14, Ap. 84.)

“Q. After 4:30 you were at liberty to do anything you pleased with your family, so long as you didn’t go beyond the hearing distance of the alarm. Is that correct? A. That is right.” (Dep. p. 16, lines 4/7, Ap. 84.)

CLARENCE ROGERS:

“Q. Now, you showed on that all the overtime that you performed? By that I mean any active duties beyond 7:30 and 4:30? A. Well, I wouldn’t say all of it, because a lot of time, maybe, I’ll go out for five or ten minutes, and I don’t bother with it. So I don’t know.

Q. Nobody told you not to bother with it, did they? A. No, they didn’t.” (Dep. p. 23, lines 6/13, Ap. 92.)

“Q. They paid all that you turned in? A. All that I ever put in.” (Dep. p. 23, lines 25/26, Ap. 92.)

“Q. When you came to take it, what, if anything was said about it that you remember; the substance of what he said about the job? A. Well, he told

me that I would work a regular eight-hour day, but I would be stuck there 24 hours a day.

Q. What did he say, if anything, about overtime? A. *We would get overtime if I was called out after 4:30.*" (Dep. p. 25, lines 8/15, Ap. 93.)

"Q. And if you were called out after the eight hours, you would get overtime for the actual work? A. *That is right.*

Q. That is what you understood your compensation would be? A. *That's it.*" (Dep. p. 26, lines 7/12, Ap. 93.)

Headgate Tenders.

E. G. EGGERS:

"Q. Is he the man that employed you for that job? A. Yes, sir.

* * * * *

Q. Now, did he ever say anything to you about paying you any overtime? A. Yes, sir.

Q. What did he say about that? A. It would be time and one-half.

Q. For what? A. *When I was called out at night.*" (Dep. pp. 17-18, lines 2/4, Ap. 102.)

"Q. Oh, did you keep your own time? A. Yes, sir." (Dep. p. 22, lines 9/10, Ap. 103.)

"Q. Have you ever put in any claim for overtime that hasn't been allowed? A. No, sir." (Dep. p. 25, lines 1/3, Ap. 103.)

Cross-Examination (By Mr. Sokol)

"Q. Will you state whether or not to your knowledge your monthly salary is based upon eight hours of work a day, or 24 hours a day?

* * * * *

The Witness: It is based on an eight-hour day."
(Dep. p. 31, lines 7/12.)

F. E. GRIFFES:

"Q. Now, if you spend more than eight hours a day at that, you put that overtime in, don't you?
A. Yes.

Q. And you get time and a half for it? A. Yes, sir." (Dep. p. 15, lines 1/5, Ap. 109.)

"Q. Now, these days that you don't walk the flume, when you are cutting brush, or lumber, about how many hours do you put in on that? A. *Eight hours.*" (Dep. p. 29, lines 11/14, Ap. 112.)

Cross-Examination (By Mr. Sokol, Plaintiffs' Counsel.)

"Q. By Mr. Sokol: But my question is: Do you regularly work from 7:30 a.m. to 4:30 p. m.? A. Yes, regularly.

Q. With an hour off for lunch? A. Yes.

Q. After that time where do you go; to your home? A. Yes." (Dep. p. 30, lines 18/24, Ap. 113.)

"Q. When do you get paid after your regular shift ends at 4:30 p. m.? When do you get paid for work after that time? A. *Whenever I am called out.*

Q. Called out from where? A. From home.” (Dep. pp. 31-32, lines 23/1, Ap. 113.)

“Q. Did anyone tell you that the only time you would get paid overtime for was the time you actually did work after 4:30 p.m.? A. Yes.” (Dep. p. 36, lines 23/26, Ap. 114.)

PRIMARY SERVICE MEN.

J. D. BORDEN:

“Q. You didn’t understand, when you went to work, that you got any overtime for any standby unless you were called on to perform some actual service, did you? A. *No, sir; only for actual service called on.*” (Dep. p. 19, lines 23/26, Ap. 16.)

“Q. You received a salary of \$225 a month, didn’t you? A. That is right.

Q. And you understood that was all you were going to get unless you actually did something after your eight hours of work? A. Yes. I was given to understand that that would be all I would get unless I got overtime *which I would be called on for.*” (Dep. p. 20, lines 16/24, Ap. 16-17.)

“Q. Well, on your overtime sheet you put on all the actual services that you performed after eight hours? A. *That is right; yes.*

Q. And you got paid for all of them? A. *We got paid for all that was on that sheet, yes, all that I did.*” (Dep. pp. 21-22, lines 21/26, Ap. 17.)

W. H. CULBERTSON:

“Q. What instructions did you have about either staying at home or leaving telephone calls where you could be reached? A. You were always supposed to be reached by the telephone or they knew where you were at all the time.” (Dep. p. 12, lines 9/13, Ap. 21-22.)

“Q. And if you went out of your own house, to leave word where they could reach you? A. All the time.

Q. I say is that the substance of what he told you? A. Yes.” (Dep. p. 15, lines 3/7, Ap. 22.)

“Q. As I understand it, after 5:00 in the evening and before 8:00 in the morning you had nothing to do for the company except answer a call when you were called? A. *Whenever we were called on trouble, that is all.*” (Dep. p. 22, lines 1/4, Ap. 23-24.)

“Q. You never put down any overtime that you didn't get paid for, did you? A. No, sir.

Q. And insofar as you knew, you put down all of the overtime you did perform, didn't you? A. I tried to.” (Dep. pp. 23-24, lines 26/5, Ap. 23.)

JOHN M. SMITH:

“Q. Then you were paid time and one-half for anything you actually did after your regular hours? A. Yes; when we were called out to work.” (Dep. p. 14, lines 7/9, Ap. 31.)

“A. Yes; I made out my own time sheets.

Q. You put in for all your overtime as you figured it? That is, you figured it, didn't you? A. Yes.

Q. And you were paid for all of it? A. I was paid for all of it. I never turned in any that I didn't get paid for." (Dep. p. 15, lines 5/11, Ap. 31.)

"Q. Were you told at any time that you would not be compensated for the time that you were standing by waiting to answer those emergency calls? A. Well, I don't know as though I was told that when I took the job, but then everybody else had been doing the same way and, of course, I knew.

Q. *You mean that is the custom and practice in the company?* A. *That is the way they had been doing for years, at least ever since I've been there.*" (Emphasis added.) (Dep. p. 19, lines 12/21, Ap. 32.)

"Q. But you have been getting time and one-half for the time that you actually used in actual work on an emergency call? A. Yes." (Dep. pp. 19-20, lines 24/1, Ap. 32.)

"Q. *And so you never got any money for waiting?* A. *No.*" (Dep. p. 23, lines 2/3, Ap. 33.)

A. L. HONNELL:

"Q. Well, have you had any instructions as to whether you should stay at home or if you went some place else leave your telephone number? A. Yes. If I want to go to Joe's house, providing he has a telephone, I in turn call the substation and notify them where I will be so in case they want to get hold of me they can." (Dep. p. 10, lines 6/12, Ap. 28.)

"Q. You have been paid fully according to the time sheets that you have turned in? A. Yes, sir." (Dep. p. 22, lines 10/12, Ap. 29.)

Cross-Examination

(By Mr. Sokol, plaintiffs' Counsel).

"Q. Well, were you told that you would receive compensation for that standby time? A. No, I wasn't told that I would receive any compensation.

Q. Were you told that you would only get paid for the times you left your home on duty? A. *The only time that we would get paid for is the time that we left our home to go on call and take care of whatever emergency trouble arose.*" (Emphasis added.)
(Dep. p. 25, lines 8/16, Ap. 29.)

Nos. 12,070, 12,071.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 12,070.

MYRON E. GLENN, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., a corporation,

Defendant-Appellee.

No. 12,071.

RAYMOND F. DRAKE, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., a corporation,

Defendant-Appellee.

Petition for Rehearing or, in the Alternative,
Modification of the Opinion.

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Defendant-Appellee.

Petition for Rehearing or, in the Alternative,
Modification of the Opinion.

*To the Honorable United States Court of Appeals for
the Ninth Circuit, and to the Judges Thercof:*

The appellee in the above entitled causes respectfully petitions for a rehearing of these causes or, in the alternative, for a modification of the opinion heretofore rendered on the ground that the opinion misinterpreted Section 2 (a) (2) of the Portal-to-Portal Act.

Throughout this petition all emphasis is ours unless otherwise noted.

In the opinion it is said:

“There is no question but that the Portal-to-Portal Act constitutes a complete defense to both actions if it applies. Its application depends upon whether the employment by express terms require pay for what has been termed the inactive periods (29 U. S. C. A. § 252 (a) (1)) *or whether like inactive periods in comparable enterprises practice paying therefor.*”

We respectfully submit that the italicized portion of the above quoted portion of the opinion was erroneous and exactly contrary to the express wording of the statute and the express intention of Congress. Section 2 (a) of the Portal-to-Portal Act provided that no employer should be liable on account of any activity engaged in prior to the date of enactment unless it was made so by

“(1) an express provision of a written or non-written contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

“(2) a custom or practice in effect, at the time of such activity, *at the establishment or other place where such employee was employed*, covering such activity * * *

Congress, in the foregoing language, which is too clear to admit of the slightest ambiguity, excluded *an industry custom or practice* and specifically made that of each particular employer controlling. The Congressional Record shows that this was no inadvertence but the express intention of Congress, which twice debated the question as to whether the controlling custom or practice should be

that of the industry or of each particular place of employment, and twice voted for the wording of the bill as passed.*

On February 27, 1947, Representative Celler, in speaking against the bill as enacted, said:

“* * * Compensation may be barred by custom or practice. *And it is not custom or practice in the industry but in the particular establishment.* Practices in different plants within the industry may differ. Thus wages may differ in different places. That may be noncompetitive conditions.”

House of Rep., Feb. 27, 1947, 93 Cong. Rec. 1550.

On that same day Representative Kefauver closed his argument in support of Mr. Celler's contentions as follows:

“The gentleman from New York [Mr. Keating] offered an amendment providing that this custom or practice should be that practiced by the *industry in a particular locality.* That would help to a certain degree, *but that amendment unfortunately was not adopted.*”

House of Rep., Feb. 27, 1947, 93 Cong. Rec. 1562.

*In Part I of the Portal Act, explaining the reasons for its enactment it is recited:

“* * * (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that *included in their agreed rates of pay*; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated *by either the employer or employee* at the time they were engaged in; * * *

The next day Representative Javits offered the following amendment:

“On page 6, line 5, strike out the period after the word ‘representative’ and substitute a semicolon and insert the following clause: ‘or upon the failure of an employer to pay any other employee for activities heretofore or hereafter engaged in by such employee other than those activities which at the time of such failure were specifically required to be paid for, either by custom or practice *of the particular industry most nearly applicable to such activities*, or by express agreement at the time in effect between such employer and such employee.’ ”

House of Rep., Feb. 28, 1947, 93 Cong. Rec. 1622.

After debate this amendment was defeated on that same day (Congressional Record 1623).

In the Senate in a debate upon the bill, Senator Hawkes on the 18th of March, 1947, said, in part:

“Mr. Hawkes. Is it not true that the bill states that portal-to-portal activities do not come under the term ‘work’ unless the parties specifically understand and agree that they are to come under that term?

Mr. Donnell. Either by contract or custom or practice.

Mr. Hawkes. Yes, either by contract or custom or the habits of the community that are familiar to the people.

Mr. Donnell. No, Mr. President, I would not say ‘the habits of the community’; *but the custom in the*

particular place of business or particular establishment or other place where the employee is employed. Mr. Hawkes. That is exactly what I meant. Probably I misspoke myself."

82 Senate Report, p. 45, colloquy between Senators Donnell and Hawkes, 1947 Cong. Rec. 2253.

On the 19th of March, Senator McCarran, in discussing this phase of the bill, said:

"Mr. McCarran. * * * I call particular attention, Mr. President, to the language 'at the establishment or other place where such employee was employed.' That does not mean the general custom or practice in an industry, Mr. President. *It does not mean a custom or practice generally accepted and sanctioned by usage.* It means nothing more or less than a custom or practice *put into effect by the employer at the particular establishment in question.*"

Senate of the U. S., March 19, 1947, 93 Cong. Rec. 2321.

The Court's summarization of Section 2 (a) (2) of the Portal Act apparently construes the Act as though the amendment to it, *twice proposed and twice rejected by Congress* had been adopted. The summarization is not only contrary to the clear language and intent of Congress, but to this Court's prior interpretation of the Portal Act and to that of other Courts.

In *Tipton v. Bearl Sprott Co.*, 175 F. 2d 432, the District Court dismissed the action on the ground the complaint did not show the employees were engaged in interstate commerce. This Court held the complaint sufficient in that regard but held that it did not show the jurisdiction required by the Portal Act and, since it was conceivably

possible it could be amended, reversed with directions to plaintiffs to amend if they were so advised, saying:

"The third amended complaint did not allege that such activities were compensable by an express provision of a written or non-written contract in effect at the time of such activities, between appellants, their agent or collective-bargaining representative and appellees, or by a custom or practice in effect at the time of such activities, *at the establishment or place where appellants were employed, covering such activities*, not inconsistent with a written or non-written contract, in effect at the time of such activities, between appellants, their agent or collective-bargaining representative and appellees, or that such activities were engaged in during the portion of the day with respect to which they were so made compensable.

"Thus the third amended complaint failed to state a claim of which the District Court had jurisdiction. It should have been dismissed on that ground. That the District Court's jurisdiction was not challenged is immaterial."

Tipton v. Bearl Sprout Co., 175 F. 2d 432, 436-7.

The precise question came before the Second Circuit in *Bonner v. Elizabeth Arden, Inc.*, 177 F. 2d 703, 705. In that case the District Court, after the Portal Act, granted a motion to dismiss for lack of jurisdiction. Plaintiff then sought leave to file an amended complaint, in which it alleged that it was the custom and practice in the industry generally to pay for the particular activity for which overtime was sought. The District Court in denying the motion said, in part:

"This, clearly, is not a compliance with Section 2 (a) (2) of the Act, which provides that 'No employer shall be subject to any liability * * * ex-

cept an activity which was compensable by * * *
(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, * * *.’

“There may well have been such a custom or practice in the industry, which was not, however, in effect in the defendant’s establishment.”

Bonner v. Elizabeth Arden, Inc., 80 F. 2d 243, 245-6.

The Circuit Court of Appeals affirmed the dismissal, saying:

“The proposed amended complaint added to the first count allegations that ‘it was the custom and practice in this industry to pay these employees for overtime hours spent in preliminary and postliminary activities prior to and subsequent to the performance of their duties’ and that pursuant to the custom in the trade such activities were compensable work.’ But there was no allegation, as §2 of the statute required, in respect to activities engaged in prior to May 14, 1947, to the effect that these activities were compensable either by a contract between the employee, or someone acting for him, and the employer in effect at the time they took place, or in accordance with a custom or practice *at the place of employment covering such activities*, in effect at the time they took place, and not inconsistent with a contract binding both employees and employer and in effect at the time. Consequently as regards activities engaged in prior to May 14, 1947, the first count of the proposed amended complaint failed to comply with the jurisdictional requirements of § 2 of the Portal to Portal Act, *supra*. * * *”

Bonner v. Elizabeth Arden, Inc., 177 F. 2d 703, 705.

See to the same effect:

Markert v. Swift & Co. (2nd. Cir.), 173 F. 2d 517.

The Wage and Hour Administrator on November 18, 1947, in his bulletin interpreting the Act said:

“(d) The words ‘custom or practice’ as used in the Portal Act, do not refer to *industry custom or the habits of the community which are familiar to the people*; these words are qualified by the phrase ‘in effect * * * at the establishment or other place where such employee was employed’. The compensability of an activity under custom or practice, for purposes of this Act, is tested by the custom or the practice at the ‘particular place of business’, ‘plant’, ‘mine’, ‘factory’, ‘forest’, etc.”

The erroneous statement of the Court is readily understandable. Ordinarily, where the rights of the parties depend upon custom or practice, it is the custom or practice *not of an individual, but of the industry*. However, the misinterpretation of Section 2 (a) (2) of the Portal Act apparently was controlling of the decision, for following it the opinion states:

“There is nothing conclusive in the case as it was presented to the trial court upon the issue of practice or custom in other like enterprises.”

There not only was no conclusive showing but no showing at all as to any industry custom or practice. The affidavits as to custom and practice of the P G & E were introduced upon entirely different issues raised by appellee's affirmative defenses for an entirely different pur-

pose, namely, to show that the custom and practice of that company was similar to the appellee's so as to justify appellee in relying upon certain rulings made by the War Labor Board with reference to the P G & E.

If, as seems apparent from the face of the opinion, the decision of this Court that a trial on the merits is necessary was based on the erroneous assumption that the practice or custom in other like enterprises was an issue upon which a conclusive showing had to be made, then, we submit, we are entitled to a rehearing. If the erroneous statement of the Court was a mere inadvertence in summarizing Section 2 (a) (2) of the Act and this Court feels that the question of lack of jurisdiction of the District Court cannot be decided on a motion but requires a trial on the merits, then we are in the position usually occupied by losing counsel of respectfully disagreeing with the Court's views but bowing to them. However, in such event we believe the Court will agree with us that the opinion should be modified by changing the last paragraph on page 3 to read as follows:

“ . . . Its application depends upon whether the employment by express terms require pay for what has been termed the inactive periods (29 U. S. C. A. §252 (a) (1)) or whether the inactive periods were made compensable by custom or practice in effect *at the time of such activities at the establishment or other place where the appellants were employed.*”

and that there be deleted from the opinion the portions heretofore quoted:

“ . . . There is nothing conclusive in the case as it was presented to the trial court upon the issue of practice or *custom in other like enterprises.*”

While we are confident that it can be demonstrated that the appellee's custom or practice was the custom and practice of the industry not only throughout California but the nation, still, we submit that neither party should be put to the unnecessary time and expense of preparing for or introducing evidence in a trial on the merits upon any issue of an industry custom or practice when Congress twice rejected custom or practice of an industry and made that of each place of employment controlling.

We, therefore, respectfully but confidently submit that we are entitled to a rehearing, or a modification of the opinion in the manner suggested.

All of which is respectfully submitted.

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The undersigned certifies that in his judgment the foregoing petition is well founded and that it is not interposed for delay.

NORMAN S. STERRY.

IN THE
UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 12083

CUTTER LABORATORIES, INC.,

Appellant,

v.

LYOPHILE-CRYOCHEM CORPORATION, ESSDEE PATENTS, INC.,
and TABOR-OLNEY CORPORATION,

Appellees.

BRIEF FOR APPELLEES

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FILED

AUG 1 1949

PAUL P. O'BRIEN,

CLERK

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12083

CUTTER LABORATORIES, INC.,

Appellant,

v.

LYOPHILE-CRYOCHEM CORPORATION, ESSDEE PATENTS, INC.,
and TABOR-OLNEY CORPORATION,

Appellees.

BRIEF FOR APPELLEES

There are here appealed from the United States District Court for the Northern District of California, Southern Division, a judgment for \$70,922.00 entered on a verdict in appellees' favor for patent infringement and a decree dismissing an equitable defense and counterclaim interposed by appellant.

Statement of the Case

Summary of the Facts

The principal invention forming the subject-matter of the charged infringement in this case is that of the Reichel Patent No. Re 20,969 [P. Ex. 1, R. 938-944]. This invention is of a process for the preservation of perishable

biological substances [R. 940]. A subordinate invention is that of the Flosdorf and Stokes Patent No. 2,345,548 [P. Ex. 3, R. 953-960]. This subordinate invention is an improvement upon the Reichel process [R. 119-120] and is based upon the discovery that the Reichel process can be successful for its intended purpose under less rigorous conditions than Reichel suggests [D. Ex. E*, pp. 59-61, 67].

What Reichel invented were specific new procedures which, when followed, produce a new and useful result, namely, a rapidly and reliably preserved biological substance [R. 97-98]. This goal had been sought since the nineteenth century [R. 95-96], but up to the time of Reichel's work others striving for success had followed the wrong path [R. 96, 98].

The substances which Reichel's process is used to preserve are, for example, penicillin, various sera, vitamin and hormone preparations, and human blood plasma [R. 88].

Two means of preserving animal tissue and kindred products of biological origin have long been known, namely, drying and freezing. It had, long before Reichel, occurred to others to attempt to combine the virtues of these two familiar expedients [R. 94-95]. What had not been discovered prior to Reichel was a procedure to use successfully in combining these processes to produce a dried product which would be of reliably unvarying characteristics and of adequate storage life [R. 98-99]. It speaks volumes for the success of the Reichel process

* Defendant's Exhibits B, C and E are not printed in full in the Transcript of Record. By Order of this Court dated November 9, 1948 [R. 383] they may be considered in their original form. Page references are to the number (as finally corrected by the Patent Office in pencil, if more than one number appears) appearing on the bottom of the pages of the certified photostat exhibits.

that human blood plasma dried in the Reichel manner can be preserved without refrigeration as long as five years without impairing its reliability [R. 85].

In the Reichel process the material to be preserved is first frozen and then subjected to a high vacuum [R. 84]. The effect of the high vacuum is to cause the water present in the frozen product in the form of ice to sublime, *i. e.*, pass directly from the solid to the gaseous state [R. 147]. The water vapor thus formed is continuously removed. Reichel contributed two important steps [R. 84, 97-98, 148], the proper combination of each of them with known steps constituting a separately important new and useful process, the carrying out of both simultaneously constituting the customary Reichel process now widely used by the pharmaceutical industry, including appellant.

One of these steps constituted heating the frozen material during the application of the high vacuum and while the evolving water vapor was being removed as it formed for the purpose of hastening the removal of the ice from the frozen product with the limitation that the heating not be permitted to cause the frozen product to melt. This new process is particularly covered by claims 6 and 12 of the Reichel patent [R. 943].

The other of these steps constituted continuing the application of the high vacuum to the product being dried after the last of the ice in that product had passed into water vapor and until the product under the vacuum reached a temperature well above the freezing point (about $0^{\circ}\text{C}.$). This new process is particularly covered by claims 11 and 13 of the Reichel patent [R. 943-944].

When the Reichel process had been scientifically demonstrated as capable of producing preserved products safe to use in the treatment of human beings, it began to find widespread acceptance and attention was turned to improving its commercial application. In the course of

developing and experimenting with improved apparatus. Flosdorf and Stokes discovered that, if the water vapor were removed by directly pumping it from the vacuum space as a gas, the vacuum required might be lower [D. Ex. E., pp. 41-43]. Quite plainly, the higher the vacuum, the more difficult it is to maintain and the more tedious and expensive the process. The Flosdorf and Stokes discovery is subordinate to the Reichel invention, but it is nonetheless a true process consisting in taking certain prescribed steps in a certain prescribed manner with a new and practical result. It does not matter which of a number of widely different available pumping devices is employed [D. Ex. E., p. 59]. So long as neither a cold condenser nor a chemical desiccant is employed in the vacuum space, the vacuum required is not as high as when a cold condenser or a chemical desiccant is used. This new process is covered by claims 4 and 5 of the Flosdorf and Stokes patent.

A most dramatic accomplishment of the Reichel process was the production of the vast quantities of dried human blood plasma used by the Armed Forces during the recent war [R. 95]. This production was carried out under license from appellees without royalty [R. 354]. After the war blood plasma and other blood fractions, sera and the like continued to be dried commercially by the Reichel process with or without the Flosdorf and Stokes improvement, by the pharmaceutical manufacturers of this country, including appellant [R. 156-168], many of whom are appellees' licensees [R. 327].

Dr. Reichel was an employee of Sharp & Dohme, Inc. [R. 210], one of our better-known pharmaceutical manufacturers. Dr. Flosdorf was an associate of the F. J. Stokes Machine Co. [R. 954], one of our better-known makers of high-vacuum apparatus. There is no evidence that either Sharp & Dohme or Stokes has ever engaged in business in the other's field. Essdee Patents, Inc., one

of the appellees, is a wholly-owned subsidiary of Sharp & Dohme [R. 324] and holds legal title to the Reichel patent in suit [R. 964]. Tabor-Olney Corporation, one of the appellees, is a wholly-owned subsidiary of Stokes [R. 324] and holds legal title to the Flosdorf and Stokes patent in suit [R. 961]. Lyophile-Cryochem Corporation, the third of the appellees is a corporation jointly owned by Sharp & Dohme and Stokes [R. 324] and was organized for the purpose of licensing [R. 321] the Reichel process and related improved processes and products [R. 322] developed or acquired by Sharp & Dohme or Stokes to persons wishing to take licenses thereunder.

The effect of this method of exploiting the patents of the two non-competing principals is (1) to permit Stokes to enjoy the patent monopolies in its own field, machinery, exclusive of everyone except Sharp & Dohme acting for itself and not for resale; (2) to permit Sharp & Dohme to practice, not exclusively, the inventions of the patents in its own field, the manufacture of pharmaceutical products; and (3) to permit Sharp & Dohme and Stokes to share the royalties obtained from the licensing of the patents covering the manufacture of the pharmaceutical products [D. Ex. O., R. 768-937]. This licensing has been carried out in a non-discriminatory and non-restrictive manner [R. 364-368 and P. Ex. 7, R. 969-971].

The Proceedings Had

Court proceedings between the parties began with an action on the case brought by appellees for damages arising out of patent infringement [R. 2-5]. The charge of infringement under the original complaint was finally limited to claims 6, 11, 12 and 13 of the Reichel patent and claims 4 and 5 of the Flosdorf and Stokes patent [R. 5-7].

In its answer [R. 8-29] appellant pleaded the usual legal defenses to a patent infringement action and, additionally, pleaded an equitable defense to such an action, namely, that appellees had misused the patents in suit and therefore, should not be permitted to enforce them. The answer also included a counterclaim seeking a declaratory judgment that all claims of plaintiffs' patents were invalid or not infringed or unenforceable for misuse.

Thus when the controversy came to trial there were tried simultaneously appellees' action "on the case" (35 U. S. C. § 67) for damages for infringement of the specified claims where the jury was the sole trier of issues of fact [R. 40] and appellant's equity suit (35 U. S. C. § 70) for a declaratory judgment [R. 61] of invalidity or non-infringement of all the other claims. Since, as to validity and infringement, the evidence to be received in these two proceedings was substantially identical, both were tried together and, after the jury had rendered its verdict on the issues submitted to it, additional evidence was taken to enable the trial judge to determine the equitable defense of misuse alleged by appellant [R. 63].

Thus, with respect to claims 6, 11, 12 and 13 of the Reichel patent and claims 4 and 5 of the Flosdorf and Stokes patent, the appellate jurisdiction of this Court is invoked in an action at law tried to a jury, while with respect to the other claims of these patents and with respect to the defense of misuse, this Court is asked to undertake the more sweeping task of equity review. These procedural matters are here set out in detail because their importance has been so far ignored by appellant that appellant's opening brief, although designating the appeal from the judgment on the verdict "the principal appeal" consists largely of an invitation to this Court to disregard the Seventh Amendment and reexamine fact issues submitted to a jury upon instructions not objected to by appellant and determined by that jury against appellant.

Introduction

The imprecision with which the supposed errors of the District Court are "specified" by appellant necessitates a brief explanation by appellees of the plan of this brief.

For example, appellant's specification of error numbered "1" sets forth as a single error on appeal, (a) the failure of the judge to direct a verdict or to grant a judgment notwithstanding the jury verdict which would be error only if, on the evidence viewed most favorably to the victor, a reasonable man could not fairly arrive at the verdict; (b) the failure of the judge to grant the motion for a new trial which is only reviewable as an abuse of discretion; and (c) the failure of the judge trying the counterclaim without a jury to find for appellant. As grounds for urging these several errors, appellant broadly asserts "all the claims of Reichel reissue patent No. Re 20,969 are invalid for lack of patentable invention as a matter of law". The other four "specifications" of error are equally diverse and unprecise.

Appellees will show that the District Court was correct and that:

A. The Judgment on the Verdict Should be Affirmed.

B. The Equitable Defense of Misuse was Properly Dismissed.

C. The Decree on the Counterclaim Should be Affirmed.

Thereafter, appellees will (D., Rebuttal) point out to the Court the many errors of fact and law in Appellant's Opening Brief.

SUMMARY OF ARGUMENT

A. The Judgment on the Verdict Should Be Affirmed.

1. The presence or absence of patentable invention is a question of fact.

2. Sufficiency of disclosure and definiteness of claims in a patent are questions of fact.

3. Infringement is a question of fact.

4. It is the province of the jury to weigh the evidence and finally decide all questions of fact as to which, upon the evidence, reasonable men might fairly reach different conclusions.

5. Unless the verdict cannot be sustained as the conclusion of reasonable men, taking the evidence in the light most favorable to the successful party, it is not to be set aside.

6. There is evidence to support the conclusion that the Reichel patent and the Flosdorf and Stokes patent disclose and claim patentable inventions.

7. There is evidence to support the conclusion that the Reichel patent complies with every requirement of R. S. § 4888, 35 U. S. C. § 33.

8. There is evidence to support the conclusion that the Reichel patent and the Flosdorf and Stokes patent have been infringed by appellant.

B. The Equitable Defense of Misuse Was Properly Dismissed.

9. To establish the defense of misuse of a patent and thus to render that patent unenforceable, it must be shown

that the patent has been used as a means for restricting the free play of competition beyond those restrictions which the patent laws establish.

10. The evidence in the present case fails to establish any restraint of trade or competition between traders, any lessening of the incentive to invent, or the existence of any monopoly or tendency to monopoly beyond the scope of claims granted by the Patent Office.

11. The evidence shows that it was the policy of Lyophile-Cryochem Corporation actively to promote the non-discriminatory licensing of the process and product claims of the patents in suit (and of patents licensed with them) and that this licensing was of a non-restrictive character without price-fixing, quotas, or tie-in between the licensing of the process and product claims and the purchase of machinery, patented or unpatented.

C. The Decree on the Counterclaim Should Be Affirmed.

12. The validity and infringement of claims 6, 11, 12 and 13 of the Reichel patent and of claims 4 and 5 of the Flosdorf and Stokes patent were not open for adjudication on the counterclaim, and were not covered by the decree thereon.

13. No error is urged with respect to the declaratory adjudication of validity of claims 1, 2 and 3 of the Flosdorf and Stokes patent and the only error urged with respect to the declaratory adjudication of validity of claims 1, 2, 3, 4, 5, 7, 8, 9 and 10 of the Reichel patent is that the District Court made an erroneous finding of fact with respect to the question of invention.

14. The finding of the District Court that claims 1, 2, 3, 4, 5, 7, 8, 9 and 10 of the Reichel patent are valid cannot be said to be plainly erroneous.

D. Rebuttal.

15. The inventions of claims 6, 11, 12 and 13 of the Reichel patent are processes, properly claimed.

16. Claims to sub-combinations are legally valid and claims 6, 11, 12 and 13 of the Reichel patent are legally complete.

17. Whether or not the bringing together of the recited steps of the claims of the Reichel patent constituted an inventive act and resulted in patentable combination processes or in mere aggregations is the chief contested issue between the parties and is a question of fact, not of law.

18. The proof of infringement of the Reichel patent was clear and complete and appellant's entire argument about non-infringement is a plea to this Court to re-examine questions of fact decided adversely to it by the jury.

19. The argument that claims 4 and 5 of the Flosdorf and Stokes patent are for the mere function or effect of a machine is not supported by the facts upon which the jury, properly instructed as to the law, found against appellant.

20. Appellant's entire argument with respect to the supposed misuse of the patents in suit is based on good law, but a complete disregard of the facts.

ARGUMENT

A. The judgment on the verdict should be affirmed.

1. The presence or absence of patentable invention is a question of fact.

Aside from the "misuse" question appellant's appeal, based on an attempt to have this Court consider questions of fact as questions of law, verges on the frivolous. As presented, it would seem to involve the fundamentals of the American patent system and of the American system of jurisprudence, and to require this Court to determine what, in the American patent system, according to the dichotomy of the American system of jurisprudence, is a question of law and what is a question of fact. These fundamental questions have long since been authoritatively resolved, so that all that is required to dispose of this appeal (except as to the "misuse" question) is the application of well settled rules to the clearly delineated issues.

A law is a rule of general applicability. A fact is a demonstrable happening. If a certain pattern of demonstrable happenings occurs, then, by reason of a rule of general applicability, certain legal consequences ensue.*

* This basic point of the philosophy of Anglo-American jurisprudence is briefly touched in *Wigmore on Evidence* (3rd Ed., Boston, 1940) § 1 (a). The dichotomy was so well established in 1791 that the Seventh Amendment to the Federal Constitution assumes complete understanding of it in the classic prohibition "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law". That the philosophy of the common law was then precisely as it is here restated may be clearly seen from the following passage from Blackstone:

"It is wisely therefore ordered, that the principles and axioms of law, which are general propositions, flowing from abstracted

(Footnote continued on following page.)

It is the duty of the judge to formulate the rule of general applicability from the constitutional, statutory and common-law sources. It is with the proper formulation of such a rule of general applicability that questions of law are concerned.

It is the duty of the jury to determine from the evidence what happenings have occurred and, on a general verdict, to make the final determination as to whether or not the sum of the happenings proved by that evidence to have occurred amounts to a pattern to which a rule of general applicability attaches legal consequences in accordance with the instructions of the judge. The determination from the evidence, both by the separating of the credible from the incredible and by the making of reasonable inferences, of what happenings have occurred is the determination of questions of fact.

All too often lawyers assert that where there is no difference between the parties as to the truth or falsity of the evidence there can be no issue of fact. Nothing could be more erroneous. Instead, wherever from the evidence, undisputed though it may be, reasonable men might fairly reach different conclusions by inference, there exists a

(Note continued from preceding page.)

reason, and not accommodated to times or to men, should be deposited in the breasts of the judges, to be occasionally applied to such facts as come properly ascertained before them. For here partiality can have little scope: the law is well-known, and is the same for all ranks and degrees; it follows as a regular conclusion from the premises of fact pre-established. But in settling and adjusting a question of fact, when intrusted to any single magistrate, partiality and injustice have an ample field to range in; either by boldly asserting that to be proved which is not so, or more artfully by suppressing some circumstances, stretching and warping others, and distinguishing away the remainder. Here therefore a competent number of sensible and upright jurymen, chosen by lot from those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice". III *Blackstone*, ch. 23 (Seventh Ed., Oxford, 1775) pp. 379-380.

And see *Dimick v. Scheidt*, 293 U. S. 474 (1935).

question of fact which at common law as in an action "on the case" must be left for the jury to resolve. *Tennant v. Peoria & P. U. Ry.*, 321 U. S. 29, 35 (1944).

In the American patent system the rules of general applicability are found in the Constitution and in acts of Congress. These rules are by our common law system of jurisprudence given a more specific content as the years pass by the analogies which may be drawn and the deductions which may be made from the facts of successive decided cases. Where a sufficient number of such cases permit, subsidiary rules of general applicability may be deduced. Nothing is more notable about the American patent system than the fact that, although the governing statute has remained in substance unchanged for 113 years, no definition of patentable invention has ever been resolved into a rule of law. It cannot be said categorically in any case that the evolution of something proved to be new did or did not require the exercise of the inventive faculty without the introduction of evidence to show the facts and circumstances surrounding the evolution. It may be, in any given case, that when all the evidence is in only one inference can be reasonably drawn by fair-minded men. In such a case there is no question to submit to a jury. For examples, see *Brady v. Southern Ry.*, 320 U. S. 476, 480 (1943), and *McIlvaine Patent Corporation v. Walgreen Co.*, 138 F. 2d 177 (7th Cir. 1943), cited by appellant. In most cases, however, either problems of credibility or problems of conflicting inferences arise. So in this case where the Patent Office, the trial judge and the twelve jurors were in accord in inferring from substantially the same evidence that patentable invention had been demonstrated, it cannot now be said that reasonable men could not fairly make that inference.

The appellant would have it that the presence or absence of invention in the patents in suit can be determined as a matter of law, but the appellant significantly

fails to state what rule of general applicability it relies upon. Appellant is doubly embarrassed in this because, for the purposes of this case, appellant has already agreed with appellees as to all the applicable rules of law. Those rules are expressed in the trial judge's charge to the jury to which no objection of any kind was made by either party [R. 40].

Turning now from the general to the particular, the rule of general applicability which makes the presence of invention a requirement for a valid patent is expressed in R. S. § 4886 (35 U. S. C. § 31):

“Any person who has *invented or discovered* any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, * * * not known or used by others in this country, before his *invention or discovery* thereof, and not patented or described in any printed publication in this or any foreign country, before his *invention or discovery* thereof, or more than one year prior to his application, and not in public use or on sale in this country for more than one year prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor.” [Emphasis added.]

At least since the Patent Act of 1836 the law has had the same requirement, and uniformly since that time it has been recognized that the presence or absence of invention in a particular case presents a question of fact. *Turrill v. Railroad Company*, 1 Wall. 491 (U. S. 1863); *Keyes v. Grant*, 118 U. S. 25 (1886); *Royer v. Schultz Belting Co.*, 135 U. S. 319 (1890); *Thomson Co. v. Ford Motor Co.*, 265 U. S. 445 (1924); *United States v. Esnault-Pelterie*, 303 U. S. 26 (1938); *McRoskey v. Braun Mattress Co.*, 107 F. 2d 143 (9th Cir. 1939); *Page v. Myers*, 155 F. 2d 57 (9th

Cir. 1946); *Refrigeration Engineering, Inc. v. York Corporation*, 168 F. 2d 896 (9th Cir. 1948); *Faulkner v. Gibbs*, 170 F. 2d 34 (9th Cir. 1948).

A very excellent statement of the law on this point is found in *Keyes v. Grant*, *supra*:

“The judgment entered on the verdict rendered in favor of the defendants, in pursuance of the direction of the court, can be maintained only on the ground, either that the legal identity of the furnace described by Karsten with that covered by the plaintiffs’ patent was manifest as a matter of law, or that it was established as a matter of fact so conclusively by the evidence that a verdict the other way could not be supported, within the rule as stated in *Randall v. Baltimore & Ohio Railroad Co.*, 109 U. S. 478.

“Clearly it was not a matter of law that the specification of the plaintiffs’ patent, and the publication of Karsten, taken in connection with the drawings intended in illustration, described the same thing. The differences were obvious, in the arrangement of the parts, and the relation of the basin in one, and the fore-hearth in the other, to the interior of the furnace, and the mode of connecting the one with the other, for the purpose of drawing the metal from the furnace. So that it certainly was not a matter of mere judicial knowledge, that these differences were either not material in any degree to the result, or, if material at all, were only such as would not require the exercise of the faculty of invention, but would be suggested by the skill of an experienced workman employed to produce the best result in the application of the well-known arrangements of the furnace. It was claimed, on behalf of the plaintiffs, that the furnace described in the patent and as used by them, embodied an idea not contained in or suggested by Karsten’s publication. * * * It was insisted by the

patentees that no such arrangement and combination were to be found in Karsten's publication or in the furnaces depicted in his figures, and that the improvement which they constituted was not the result of mere mechanical skill, but sprang from a genuine effort of invention. And this view was supported by the opinion of many experts skilled in the art.

"In our opinion this was a question of fact properly to be left for determination to the jury, under suitable instructions from the court upon the rules of law, which should guide them to their verdict. And there was evidence upon both sides of the issue sufficient to require that it should be weighed and considered by the jury in the determination of the question, and this implies that, if it had been submitted to the jury and the verdict had been for the plaintiffs it would not have been the duty of the court to have it set aside as not supported by sufficient evidence. The court erred, we think, in withdrawing the case from the jury as it did by directing a verdict for the defendants" 118 U. S. 36, 37.

This unanswerable logic establishes that the presence or absence of invention in the evolution of any new and useful art, machine, manufacture, or composition of matter, is *inherently* a question of fact. Before that question can be answered, *evidence must be received* and the facts of the particular case established.

2. Sufficiency of disclosure and definiteness of claims in a patent are questions of fact.

The law on this subject is clearly stated in the statute, thus:

"Before any inventor or discoverer shall receive a patent for his invention or discovery he shall * * * file in the Patent Office a written description of the same,

and of the manner and process of making, constructing, compounding, and using it, in such full, clear concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; * * * and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery” R. S. § 4888, 35 U. S. C. § 33.

When the Congress laid down the requirements for the description and claims of a patent application, it, paying heed to the purpose of the patent system as expressed in the Constitution, Art. 1, § 8, “to promote the progress of science and useful arts”, established as the measure of the sufficiency of patent language the understanding of the man skilled in the art to which a particular patent pertains. Unless every Federal court is to be presumed to be skilled in every art, it is apparent that the evidence of the man skilled in the art as to the significance in that art of the language used must be sought. Wherever evidence is required, there is presented a question of fact.

It does not alter the essential nature of the question that in some cases the language itself is such that no reasonable man could suppose it to be definite. Such a situation merely presents the familiar grounds for taking any question of fact from a jury.

There is no better demonstration of the principle that the definiteness or indefiniteness of patent language is a question of fact than the case of *United Carbon Co. v. Binney & Smith*, 317 U. S. 228 (1942) cited by appellant. Speaking of the sufficiency of the claims of the patent there in suit to meet the requirements of R. S. § 4888, 35 U. S. C. § 33, the Supreme Court said (p. 232):

“The District Court found that the claims did not meet these requirements, and the Circuit Court of

Appeals held that they did. Much testimony was directed to this question at the trial, and it has been discussed in the briefs and argument in this Court
* * *

“Here, as in many other cases, it is difficult for persons not skilled in the art to measure the inclusions or to appreciate the distinctions which may exist in the words of a claim when read in the context of the art itself. The clearest exposition of the significance which the terms employed in the claims had for those skilled in the art was given by the testimony of Weigand, one of the patentees, whom respondent called as its witness. * * * His testimony in this respect was given principally upon cross examination, but it was in no wise impeached or contradicted, and is borne out by that of other witnesses. * * *”

It is apparent that the Supreme Court in the passage cited was determining a question of fact. This the Supreme Court, as an appellate tribunal, could do in the *United Carbon* case because the judgment there reviewed was “in equity” and the two lower courts had disagreed. What the Supreme Court there decided, on the evidence before it, was that in the carbon black art “approximately 1/16 of an inch in diameter” was an indefinite term as used in the claims of the patent there in suit and did not serve clearly to distinguish the claimed invention from the prior art. Surely no one would contend that the Supreme Court laid down a rule of general applicability that “approximately 1/16 of an inch in diameter” is a term insufficient to meet the requirements of R. S. § 4888, 35 U. S. C. § 33 in every art.

Thus reason demonstrates that it is inherent in the test of patent language laid down by Congress that the adequacy of particular language to meet that test presents a

question of fact. The authorities in support of this proposition are clear.

In *Battin v. Taggart*, 17 How. 74, 84 (U. S. 1854), the Supreme Court stated:

“We think the court also erred in saying to the jury, ‘We instruct you that your verdict, in each case, must be for the defendants’.

“This, as well as the two instructions above noticed, took from the jury facts which it was their province to examine and determine. It was the right of the jury to determine, from the facts in the case, whether the specifications, including the claim, were so precise as to enable any person skilled in the structure of machines, to make the one described. This the statute requires, and of this the jury are to judge.

“The jury are also to judge of the novelty of the invention, and whether the renewed patent is for the same invention as the original patent; and they are to determine whether the invention has been abandoned to the public. There are other questions of fact which come within the province of a jury; such as the identity of the machine used by the defendant with that of the plaintiff’s, or whether they have been constructed and act on the same principle”.

A recent decision in the Seventh Circuit holds the sufficiency of claim language in a patent under R. S. § 4888, 35 U. S. C. § 33 to be a question of fact. There the Court said:

“Under the decisions, we do not understand that we should express our opinion as to whether the claims are sufficiently specific, for that is a question of fact which the district court has decided. Our question is whether the district court’s finding in this respect is supported by substantial evidence.” *Bank v. Rauland Corporation*, 146 F. 2d 19, 23 (7th Cir. 1944).

As the Supreme Court said in *Bischoff v. Wethered*, 9 Wall. 812, 815 (U. S. 1870) in a manner so cogent as to settle the question:

“But the specifications of patents for inventions are documents of a peculiar kind. They profess to describe mechanisms and complicated machinery, chemical compositions and other manufactured products, which have their existence *in pais*, outside of the documents themselves; and which are commonly described by terms of the art or mystery to which they respectively belong; and these descriptions and terms of art often require peculiar knowledge and education to understand them aright; and slight verbal variations, scarcely noticeable to a common reader, would be detected by an expert in the art, as indicating an important variation in the invention. Indeed, the whole subject-matter of a patent is an embodied conception outside of the patent itself, which, to the mind of those expert in the art, stands out in clear and distinct relief, whilst it is often unperceived, or but dimly perceived, by the uninitiated. This outward embodiment of the terms contained in the patent is the thing invented, and is to be properly sought, like the explanation of all latent ambiguities arising from the description of external things, by evidence *in pais*.”

Clearly, then the statutory standard laid down by Congress requires that the sufficiency of a particular patent disclosure and claim to meet the requirements of R. S. § 4888 be determined as a question of fact. Any other rule would presuppose judicial omniscience—a knowledge not of the rules of general applicability in patent cases, but of every facet of every art that might be the subject of a patent.

Such is the rule in this circuit, *Schumacher v. Buttonlath Mfg. Co.*, 292 Fed. 522 (9th Cir. 1920); *Research Products Co. v. Tretolite Co.*, 106 F. 2d 530 (9th Cir. 1939).

3. Infringement is a question of fact.

This proposition is generally accepted. Plainly, there could be no rule of general application which would state, "the processes used by appellant infringe (or do not infringe) appellees' claims". The rule of general application is that of R. S. § 4919, 35 U. S. C. § 67:

"Damages for the infringement of any patent may be recovered by action on the case * * *".

Quite obviously this leaves a plaintiff to his proof, and entitles him to have the sufficiency of his proof tested according to the usual rules in such actions.

This proposition is forcefully stated by the Supreme Court in *Royer v. Schultz Belting Co.*, 135 U. S. 319, 325 (1889):

"We think the Circuit Court erred in not submitting to the jury the question of infringement, under proper instructions. If the patented invention was, within the ruling in *Morley Machine Co. v. Lancaster*, *supra*, 'one of a primary character,' and the patent was 'a pioneer patent,' which were questions of fact to be passed upon by the jury, then the question, on a proper construction of the patent, whether the defendant's machine infringed its claims, was a question of fact for the jury to determine, on all the evidence which the case might present. *Tucker v. Spalding*, 13 Wall. 453.

"It is not a matter of mere judicial knowledge that the mechanical differences between the two machines were material, in view of the character of the patented invention and of the claims of the patent; and we are unable to concur with the view of the Circuit Court, in its opinion denying the motion for a new trial, that this is a case where, if the jury had found a verdict for the plaintiff, on the evidence put in by

him on the question of infringement, all of which evidence the bill of exceptions states is set forth therein, it would have been proper for the court to set aside such verdict. *Keyes v. Grant*, 118 U. S. 25, 36 37."

Other authorities are: *Battin v. Taggert*, 17 How. 74 (U. S. 1854); *Coupe v. Royer*, 155 U. S. 565 (1895); *United States v. Esnault-Pelterie*, 303 U. S. 26 (1938); *Ralph N. Brodie Co. v. Hydraulic Press Mfg. Co.*, 151 F. 2d 91 (9th Cir. 1945); *Bianchi v. Barili*, 168 F. 2d 793 (9th Cir. 1948); *Faulkner v. Gibbs*, 170 F. 2d 34 (9th Cir. 1948).

4. It is the province of the jury to weigh the evidence and finally decide all questions of fact as to which, upon the evidence, reasonable men might fairly reach different conclusions.

It is not necessary that the parties disagree over the truth or falsity of evidence presented for a question of fact to arise. Very often the ultimate fact to be proved is not susceptible of direct presentation and must be demonstrated by inference from evidence which can be so presented. Indeed, "evidence" has been defined as "any matter of fact, the effect, tendency, or design of which, when presented to the mind, is to produce a persuasion concerning the existence of some other matter of fact". *Bentham's Rationale of Judicial Evidence*, b. I, c. I (London, 1827). As examples, intention is one matter of fact commonly required to be proved in courts of law which can only be ascertained by inference; negligence is another. The province of the jury in such cases, when the evidence is undisputed, has been clearly expressed by the Supreme Court in *Railroad Company v. Stout*, 17 Wall. 657, 663-4 (U. S. 1874):

"It is true, in many cases, that where the facts are undisputed the effect of them is for the judgment of

the court, and not for the decision of the jury. This is true in that class of cases where the existence of such facts come in question rather than where deductions or inferences are to be made from the facts. * * * In some cases, too, the necessary inference from the proof is so certain that it may be ruled as a question of law. * * * But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury”.

And see *Richmond & Danville R. R. v. Powers*, 149 U. S. 43, 45 (1893); *Bird v. United States*, 24 F. 2d 933, 935 (9th Cir. 1928).

The Supreme Court has, since the adoption of the Federal Rules of Civil Procedure, reaffirmed the authority of *Railroad Company v. Stout*, *supra*, as the measure of the respective provinces of judge and jury:

“Rule 50 (b) goes further than the old practice in that district judges, under certain circumstances, are now expressly declared to have the right (but not the mandatory duty) to enter a judgment contrary to the jury’s verdict without granting a new trial. But that rule has not taken away from juries and given to judges any part of the exclusive power of

juries to weigh evidence and determine contested issues of fact [citing *Railroad Company v. Stout*, *supra*, in a footnote]—a jury being the constitutional tribunal provided for trying facts in courts of law.” *Berry v. United States*, 312 U. S. 450, 452-3 (1941).

Manifestly, in the present case, the three questions presented—(a) the presence or absence of invention; (b) the sufficiency of the patent language for the man skilled in the art; and (c) infringement—all must be determined by inference from evidence. The trial judge correctly left the making of those inferences to the jury. In the words of the Supreme Court in *Jones v. East Tennessee, etc. R. R.*, 128 U. S. 443, 445 (1888), “We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others”.

5. Unless the verdict cannot be sustained as the conclusion of reasonable men, taking the evidence in the light most favorable to the successful party, it is not to be set aside.

Appellant urges that this Court review the denial of three motions made below.

The denial of the motion for a new trial is reviewable only as an abuse of discretion. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 247-8 (1940); *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U. S. 474, 481-5 (1933); *Allison v. Standard Air Lines*, 65 F. 2d 668, 669 (9th Cir. 1933); *Liquid Veneer Corporation v. Smuckler*, 90 F. 2d 196, 205 (9th Cir. 1937).

The grounds upon which a Federal Court is justified in directing a verdict at the close of all the evidence and the ground upon which a Federal Court may, such a motion having been made and denied or decision reserved,

after verdict set aside a verdict and the judgment thereon are the same. Here the supposed errors relied on by appellant involve, as we have shown, questions of fact. Although appellant uses the formula "as a matter of law" in its specifications of error, appellant and appellees agreed on the law of the case as it was embodied in the judge's instructions so that appellant must mean by that formula that the evidence so establishes *the facts* as to justify a directed verdict or a judgment *n. o. v.* in its favor. See *Montgomery Ward & Co. v. Duncan*, 311 U. S. 243 (1940) in which a motion made pursuant to Rule 50 is denominated a motion for judgment *n. o. v.*

As this Court has said, "It is hornbook law that, on a motion for directed verdict, the evidence adduced by the opposing party shall be taken as true and all reasonable inferences deducible therefrom shall be given their most favorable intendment". *Smith v. Shevlin-Hixon Co.*, 157 F. 2d 51, 53-4 (9th Cir. 1946).

6. There is evidence to support the conclusion that the Reichel patent and the Flosdorf and Stokes patent disclose and claim patentable inventions.

A patent is *prima facie* valid, *Mumm v. Decker & Sons*, 301 U. S. 168, 171 (1937). The presumption of validity extends to every determination of fact made by the Patent Office as an administrative agency, *Williams Mfg. Co. v. United Shoe Mach. Corp.*, 121 F. 2d 273, 277 (6th Cir. 1941), including novelty, *Bianchi v. Barili*, 168 F. 2d 793, 795 (9th Cir. 1948), utility, *Lehnbeuter v. Holthaus*, 105 U. S. 94, 96 (1882), invention, *Research Products Co. v. Tretolite Co.*, 106 F. 2d 530, 532 (9th Cir. 1939), sufficiency of disclosure, *Western States Mach. Co. v. S. S. Hepworth Co.*, 147 F. 2d 345, 348 (2nd Cir. 1945), and definiteness of claim, *Bank v. Rauland Corp.*, 146 F. 2d 19, 23 (7th Cir. 1944).

The burden of establishing the invalidity of the patents in suit rested on appellant, *Ralph N. Brodie Co. v. Hydraulic Press Mfg. Co.*, 151 F. 2d 91, 94 (9th Cir. 1945).

The jury was able to assess the weight to be given to the presumption of validity in this case because the file wrappers of the original Reichel patent and its reissue and the file wrapper of the Flosdorf and Stokes patent were in evidence. The prosecution of the Reichel patent was unusually complete and, since the patent was reissued, the Patent Office had a double opportunity to scrutinize all its claims. The Reichel patent was originally applied for on January 13, 1934. The Patent Office was supplied by Reichel with up-to-date articles [D. Ex. B, pp. 63-71] reviewing the achievements of Reichel's work and evaluating it in terms of the prior art. In the bibliography [D. Ex. B, pp. 70-71] appended to one of these articles and in the references made of record by the Examiner in the prosecution of the original and reissue applications is found what appellant regards as the most pertinent prior art. Appellant's two principal references are Shackell [R. 533-543] and Elser [R. 681-688]. Both were considered *in extenso* by the Patent Office [D. Ex. B, pp. 32-34 and D. Ex. C, pp. 25-26].

Appellees called an expert, Dr. Leake, as a man skilled in the art to which the Reichel invention appertains. Dr. Leake was, by training, a pharmacologist [R. 81-82] having actual experience with freeze-drying in the preparation of dried biological substances extending from well before the Reichel invention to the present time [R. 115, 83]. Dr. Leake reviewed for the jury the prior art [R. 93-97] and explained wherein its deficiencies lay [R. 98] and also testified to the success of the patented process and to its great importance in pharmacology and medicine [R. 87].

The prior art in this case, for example Shackell, goes back before the First World War. The products produced by the patented process are of life giving importance.

It was a significant bit of evidence of invention that the soldiers of the First World War were not provided with plasma by the prior art; the soldiers of the Second World War were provided with plasma by Reichel.

Appellant's expert was Dr. Hildebrand, physical chemist [R. 212-213]. He agreed that there was no instruction in any of the prior patents or publications to continue the vacuum until the product attained a temperature substantially above zero [R. 314], and that Morel (the only reference that includes the step of heating a frozen material) describes melting it [R. 302-303].

Dr. Hildebrand took a physicist's view of the meaning of "heating"—*i. e.*, obtaining the inflow of heat [D. Ex. K-1], whereas the claims in suit, written not for a super-physicist, but for one skilled in the pharmaceutical art, call for deliberate heating in an ordinary sense, *i. e.*, by exposure to a source of heat substantially above the freezing temperature of the material. Dr. Hildebrand had no skill in the art of pharmacology and his testimony, that had he been asked to make the Reichel invention he and his staff could have easily done so [R. 291], lacks conviction as it certainly lacks relevance. As Mr. Justice Holmes once said, " * * * a page of history is worth a volume of logic", *New York Trust Co. v. Eisner*, 256 U. S. 345, 349 (1921).

The Patent Office consideration of the merits of the Flosdorf and Stokes invention before the grant of the Flosdorf and Stokes patent was also very thorough. The process of claims 4 and 5 in suit was initially considered by the Patent Office as involving the substitution of known apparatus, *i. e.*, high-capacity vacuum pumping devices, for combinations of pumps and cold condensers or chemical absorbents, disclosed, for example by Reichel himself, as argued by appellant. This view was reversed upon a careful consideration of the improvements obtained by eliminating the condenser or absorbent [D. Ex. E, pp. 58-61] and evidence that those skilled in the art considered such

elimination not to be feasible even after the application had been filed [D. Ex. E, p. 67].

There is no art here which adds to or differs from the art considered by the Patent Office prior to the grant of this patent. Thus Dr. Hildebrand set forth the process of Flosdorf and Stokes claims 4 and 5 as a three-step process and showed that appellant used this process in some of its operations [D. Ex. K-2]. Of the seven references he selected as the best [R. 307] four of them (Altman, Shackell, Harris and D'Aunoy) used a chemical desiccant; another (Elser) used a cold condenser [R. 285]; another (Rogers) indicated a desiccant to be necessary to protect his pump from moisture [R. 315-16]; and as to the seventh (Krause and Lenk) Hildebrand, when asked whether he meant that there was not interposed between the vacuum pump and the material being dried either a condensing system or an absorbing system for the water vapor, said, "No, I didn't mean to imply that" [R. 315]. Thus, there was a failure on appellant's part to carry its burden of proving that the Flosdorf and Stokes contribution lacked novelty.

That the omission of a step previously considered necessary may give rise to a valid process patent as a matter of law is established.

"The invention of Lawther consisted in discarding the muller-stones and passing the crushed seed directly into a mixing-machine to be stirred, moistened, and heated by jets of steam or water, and then transferring the mass to the presses for the expression of the oil by hydraulic or other power.

The machinery and apparatus used by Lawther had all been used before. His only discovery was an improvement in the process. He found that, by altogether omitting one of the steps of the former process—the grinding and mixing under the muller-stones—and

mixing in the mixing-machine by means of steam, a great improvement was effected in the result.

Why should it be doubted that such a discovery is patentable?" *Lawther v. Hamilton*, 124 U. S. 1, 6-7 (1888).

7. There is evidence to support the conclusion that the Reichel patent complies with every requirement of R. S., § 4888, 35 U. S. C., § 33.

Both sufficiency of disclosure and definiteness of claim are questions of fact. The grant of the Reichel patent raises the presumption that it complies with the statute in both respects.

At the trial a great deal of time was consumed by appellant in reading to the jury extended excerpts from the Reichel original file wrapper, D. Ex. B, in an effort to establish as a fact that Reichel had attached to the terms "quickly freezing" and "substantially instantaneous freezing" used in Reichel's claims 6, 11, 12 and 13 in suit the restricted meaning of "freezing at $-70^{\circ}\text{C}.$ " The jury rejected this contention, probably because it appreciated that in passages which appellant refrained from reading, Reichel's invention was stated to involve processes including, (a) the step of active heating without melting of the frozen product to hasten the drying, and (b) the step of continuing the vacuum after sublimation of the ice was completed until the product had attained a temperature substantially above $0^{\circ}\text{C}.$, both irrespective of whether the product was initially frozen at $-20^{\circ}\text{C}.$ or $-70^{\circ}\text{C}.$ or any other temperature [D. Ex. B, p. 94], and that Reichel took the same position in the oath accompanying his reissue application [D. Ex. C, pp. 18-20].

Appellant also sought to attack the sufficiency and definiteness of the Reichel patent by the testimony of Dr. Hildebrand that "as a scientist" he didn't know what

quickly freezing meant [R. 298] and moreover he didn't think the Examiner who allowed the Reichel patent did either, though he admitted the term had been applied in the prior freeze-drying art with definite meaning [R. 298].

Dr. Leake testified that the terms used in the claims applied to freezing had meaning for those engaged in freeze-drying [R. 134] and that the elapsed time in completely freezing a given quantity of material, taken alone, did not determine whether the material was being "quickly" or "slowly" frozen [R. 150-153]; and the Patent Office obviously agreed with Dr. Leake.

The jury preferred to agree with Dr. Leake and the Examiner, and it certainly cannot be that the inference reached by it was so unsupported that no reasonable man could fairly reach it.

8. There is evidence to support the conclusion that the Reichel patent and the Flosdorf and Stokes patent have been infringed by appellant.

Appellant's employee, Murchio, testified that the first step of appellant's process is freezing the material [R. 163], that the frozen material is then subjected to a high vacuum [R. 163], that heat is supplied to the frozen material [R. 164], that the materials remain in the solid state during the drying operation [R. 166], and that at the end of the process the temperature of the material is brought well above the freezing point [R. 165]. The several variants in matters of freezing temperature used by appellant had been furnished to appellees in answers to interrogatories which were read into the record [R. 165-168], establishing that all the freezing was done at temperatures from -20 to -70°C . Appellant itself introduced an exhibit, D. Ex. K-1, purporting to compare appellant's procedures to Reichel's. This exhibit does not differentiate the two except in the matter of the tempera-

ture at which the freezing takes place. Thus, the only aspect of the question of infringement which is contested is whether or not appellant, in freezing at temperatures admitted, is freezing "quickly" or "substantially instantaneously", plainly a question of fact.

As to this question of what is meant by "quickly" or "substantially instantaneously" freezing in the freeze-drying art, Reichel claim 11 itself specifies one way of substantially instantaneously freezing, *i. e.* "by indirect contact with a refrigerant maintained at a temperature below the freezing point" of the material to be frozen. This is the method used throughout by appellant [R. 167-168]. Appellant argues here, as it did to the jury, that where temperatures as high as -20°C. are used, the evidence shows that it sometimes takes as long as sixteen hours [R. 339-340] for entire large batches of appellant's material to become frozen.

But whether a large batch is being frozen quickly or slowly cannot be determined by the length of the time which it takes for the entire batch to become frozen. Homely illustrations make this clear. If a crossing attendant were to testify that it took a freight train three minutes to pass the grade crossing, could anyone say whether the freight train was moving fast or slowly? Obviously not. If an army takes four hours to pass its general in review, does that mean that the soldiers were marching more slowly than the soldiers in a platoon which passed its lieutenant in thirty seconds? Obviously not.

Compelling evidence of what the term "quickly" means in connection with freezing in the freeze-drying art is found in the prior art cited by appellant. For example, the Elser patent [D. Ex. G-7; R. 681-688] terms freezing with a refrigerant between -12° and -20°C. as "rapid freezing" and Altmann, referring to a procedure carried out at about -20°C. termed it "quickly freezing" [R. 298]. Moreover, as Dr. Hildebrand admitted, in the

frozen food business the term "quick frozen" has a definite meaning, although he thought the term lacked scientific precision.

Further evidence is found in the patent itself. Some of the claims of the Reichel patent (1, 2, 3, 4, 9 and 10) are drawn to freezing at a temperature of -70° and in only some of defendant's processes is this temperature employed [R. 168]. It is elementary that in those claims in which the temperature is not specified Reichel must be presumed to have embraced something different. This is precisely what Reichel told the Patent Office [D. Ex. B, p. 94] when he stated that he was seeking a patent claiming a process of dehydration of a frozen material broadly "irrespective of whether the material is initially frozen at -20°C. or -70°C. or any other temperature".

It cannot be that after appellant admitted that all its freezing was at temperatures not higher than -20°C. , which is a temperature referred to by the prior art as producing quick freezing, the jury acted unreasonably in finding that such freezing met the requirements of the claims in suit.

Infringement of the Flosdorf and Stokes patent by some of appellant's operations is admitted [D. Ex. K-2].

B. The Equitable Defense of Misuse Was Properly Dismissed.

9. To establish the defense of misuse of a patent and thus to render that patent unenforceable, it must be shown that the patent has been used as a means for restricting the free play of competition beyond those restrictions which the patent laws establish.

The defense to a civil action for patent infringement that the patentee is "misusing" the patent in suit and that, therefore, the patent is unenforceable is a defense

not going to the merits of the patent or of the asserted claim of infringement. *Carbice Corp. v. Am. Patents Corp.*, 283 U. S. 27, 30 (1931). Instead, it is a defense based upon the power of an equity court to withhold its aid from a party otherwise entitled to it when the granting of that aid would produce a result contrary to public policy, *American Lecithin Co. v. Warfield Co.*, 105 F. 2d 207, 211 (7th Cir. 1939) and, in appropriate cases, the power of the chancellor to affirmatively enjoin other proceedings.

There have been quite a number of cases decided by the Supreme Court, by this Court and by other Courts of Appeal involving the defense of misuse in patent infringement litigation. In addition, there have been a number of cases involving patent license contracts and patent pools which are related to the same general doctrine. In every case in which enforcement of a patent conceded or assumed to be valid has been denied facts have been proved establishing that the use of the patent complained of had effected or tended to effect a restraint of trade or competition among traders plainly not legalized by the patent grant. Where there has been criticism or condemnation of a patent contract or patent pool, it has been based uniformly on proof of facts establishing a similar restraint or an actual combination among competitors. The pattern of facts necessary to prove to sustain the misuse defense is made plain by reviewing the six cases decided by the Supreme Court and the three cases decided by this Court in which patent enforcement has been refused.

In the Supreme Court cases in which enforcement of a patent has been withheld on the grounds of its misuse, the facts were:

Carbice Corp. v. Am. Patents Corp., 283 U. S. 27 (1931). Licensee required to purchase an unpatented commodity from licensor, *i. e.*, dry ice to use in a patented box.

Leitch Mfg. Co. v. Barber Co., 302 U. S. 458 (1938). Licensee required to purchase an unpatented commodity from licensor, *i. e.*, asphalt to use in a patented process.

Morton Salt Co. v. Suppiger Co., 314 U. S. 488 (1942). Licensee required to purchase an unpatented commodity from licensor, *i. e.*, salt tablets to use in a patented machine.

B. B. Chemical Co. v. Ellis, 314 U. S. 495 (1942). Licensee required to purchase an unpatented commodity from licensor, *i. e.*, materials to use in a patented shoe manufacturing method.

Mercoïd Corp. v. Mid-Continent Co., 320 U. S. 661 (1944); *Mercoïd Corp. v. Honeywell Co.*, 320 U. S. 680 (1944). Licensee required to purchase an unpatented commodity from licensor, *i. e.*, an unpatented element of a patented furnace control combination.

In the cases in this Court in which enforcement of a patent has been withheld on the grounds of its misuse, the facts were:

Dehydrators Ltd. v. Petrolite Corp., 117 F. 2d 183 (9th Cir. 1941). The patent owner included in the price of an unpatented commodity sold for use in practicing the patented processes a sum above the market price of that commodity as royalty. The patent owner had publicly offered a license to any one purchasing the unpatented commodity on the open market for the differential between the market price and the patent owner's price. It was held that such a policy tended to secure for the patent owner a limited monopoly in the unpatented commodity.

Vitamin Technologists v. Wisconsin Alumni Research F., 146 F. 2d 941 (9th Cir. 1945). The patented processes were useful in the improvement of the food value of oleomargarine. The patent owner wilfully refused to license the processes for use with oleomargarine in order

to suppress competition with the sale of an unpatented commodity, butter.

McCullough v. Kammerer Corp., 166 F. 2d 759 (9th Cir. 1948). A licensor corporation was formed by concert among competitors. The sole license required the exclusive licensee under it to agree not to use competing devices during the existence of the license and required the licensor not to do business with others in any competing devices. It was held that the effect of this license agreement was plainly restrictive of competition, and additionally, tended to defeat the public policy of the patent statutes by stifling the incentive to invent.

The rules of law establishing the equitable defense of misuse are not here in serious dispute. The governing decisions require proof of a restraint on competition in subject-matter not covered by the patent, or of a clog on the incentive to invent. Such proof, which it is appellant's burden to supply, is wholly lacking here.

10. The evidence in the present case fails to establish any restraint of trade or competition between traders, any lessening of the incentive to invent, or the existence of any monopoly or tendency to monopoly beyond the scope of claims granted by the Patent Office.

Appellant, after the verdict had been returned, had an opportunity to present its case in support of the allegation of misuse. Appellant called no witness except Mr. Kerr, General Manager of one of appellees [R. 360-368] and presented no exhibits except Exhibit O [R. 768-937]. The trial judge considered this evidence with care and overruled the appellant's defense [par. III, R. 58]. He commented at some length on the applicable law [R. 59-61] and entered Findings of Fact Nos. IX and X [R. 65] in favor of appellees. If any commodity, patented or unpatented, was monopolized, appellant had but to name it. If any part of commerce was being restrained, appellant

had but to point it out. If any competition anywhere was lessened or destroyed by appellees, appellant had ample opportunity to prove it. If any inventor's incentive to invent was diminished, his testimony would have been received. The silence of the record on these points is fatal to the defense. Further, with respect to machinery, about the supposed monopoly of which appellant has so much to say, it is significant that there is no evidence that any of the patents included in the accused agreements cover any machine or piece of apparatus in which anyone has any interest whatsoever. As to such patents, the supposed monopoly, for all that this record shows, is non-existent—there is no evidence that Stokes or anyone else makes machinery or apparatus under those patents, or that anyone wants to buy, sell or use such machinery or apparatus.

The conclusion is inescapable that appellant is seeking to avoid the consequences of its infringement merely because the patents in suit form the subject matter of a pooling agreement. This alone will not sustain the defense, *Standard Oil Co. v. United States*, 283 U. S. 163 (1931). The assignability of patent rights in consideration of other patent rights has been established as *per se* legal, *Transparent-Wrap Machine Corp. v. Stokes & Smith Co.*, 329 U. S. 637 (1947).

Appellant has chosen to ignore the fact that appellees did not sue its customers, and does not now seek to enjoin appellant, but only seeks money damages. Appellant has chosen to ignore the fact that the principals in the challenged pool, Stokes and Sharp & Dohme, were not before the formation of the pool, and are not now, competitors. It appears from the very contracts which appellant put in evidence [D. Ex. O, R. 768-937] that the research activities of Sharp & Dohme in the development of improved processes for the production of pharmaceuticals

and the research activities of Stokes in the development of machinery suitable for the commercial carrying out of these processes resulted in the making of machine inventions by Sharp & Dohme and in the making of process inventions by Stokes. Under these circumstances a patent pool was not only permissible, but desirable. See *Standard Oil Co. v. United States*, *supra*, at p. 171. The general plan of the pool was to give to Stokes the full monopoly right under the machine inventions of the pooled patents, to give to Sharp & Dohme a non-exclusive license under all the inventions, and to set up Lyophile-Cryochem Corporation, one of appellees, as a licensing agent to license the pharmaceutical process and product inventions to the pharmaceutical trade at large, with the revenue to Lyophile-Cryochem to be divided among the interested parties.

Instead of restraining competition beyond the scope of the patent monopolies, this arrangement opened up to the entire pharmaceutical industry the processes and products patented. Unlike the situation in *McCullough v. Kammerer Corp.*, 166 F. 2d 759 (9th Cir. 1948), Stokes, which held the full monopoly right granted by the patents with respect to machinery, did not bind itself to manufacture only the patented machinery to the exclusion of competing designs nor did it bind itself never to license others to manufacture the patented machinery. There is no evidence that Stokes has ever refused to license any one to manufacture the patented machinery or failed to supply the demand therefor.

11. The evidence shows that it was the policy of Lyophile-Cryochem Corporation actively to promote the non-discriminatory licensing of the process and product claims of the patents in suit (and of patents licensed with them) and that this licensing was of a non-restrictive character without price-fixing, quotas, or tie-in between the licensing of the process and product claims and the purchase of machinery, patented or unpatented.

Appellees were not content to rest upon appellant's failure to prove its affirmative defense. Mindful of the Supreme Court admonition in *Standard Oil Co. v. United States*, 283 U. S. 163 (1931) at page 175, that it was the operation and effect of pooling contracts that was to be examined, appellees prepared and introduced Plaintiffs' Exhibit 7 [R. 364-368; 969-971].

Exhibit 7 demonstrates affirmatively that the market for process licenses and for apparatus, *i. e.*, the firms known to be using or contemplating the use of freeze-drying, had been covered independently by the process licensing corporation, Lyophile-Cryochem, and by the manufacturer of apparatus, Stokes.

Fifty-two prospective customers are listed [R. 969-971, col. 1]; all but fourteen were actively freeze-drying [col. 2]. Stokes had approached all but one of the fifty-two as potential freeze-drying machinery customers [col. 5]; Stokes had succeeded in selling such machinery to twenty-nine [col. 7]. Lyophile-Cryochem had licensed thirty of the fifty-two under the patents in suit [col. 4]. Twenty of the fifty-two were both licensees and users of Stokes machinery [cols. 4 and 7]. Ten licensees had bought no Stokes machinery [cols. 4 and 7]. Nine users of Stokes machinery had no licenses [cols. 4 and 7]. Thirteen prospects had neither license nor Stokes machinery [cols. 4 and 7].

Appellant itself had been offered a license [R. 327-328] in the form appearing in Exhibit N [R. 761, 768], but had

refused it [R. 328]. Appellant itself, though unlicensed, had purchased machinery from Stokes [R. 970, col. 7]. Mr. Kerr, General Manager of one of appellees, testified without contradiction that, in negotiating licenses, no requirement was ever made that a licensee accept a license under all of the patents offered for license together [R. 366], that it had never been required as a condition for obtaining a license that equipment be purchased from Stokes [R. 366-367].

Unlike the Wisconsin Alumni interests whose callous disregard of public health was condemned by this Court in *Vitamin Technologists v. Wisconsin Alumni Research F.*, 146 F. 2d 941 (9th Cir. 1945), appellees have followed a policy of granting free licenses to hospitals and research organizations [R. 326] and to all participants in the war-time blood plasma program [R. 354] including appellant [R. 355].

In the face of this showing it is submitted that not only has appellant failed to prove the existence of any misuse of the patents in suit, but that appellees have affirmatively shown that the challenged pool is of the type approved by the Supreme Court in *Standard Oil Co. v. United States*, *supra*.

C. The Decree on the Counterclaim Should be Affirmed.

12. The validity and infringement of claims 6, 11, 12 and 13 of the Reichel patent and of claims 4 and 5 of the Flosdorf and Stokes patent were not open for adjudication on the counterclaim, and were not covered by the decree thereon.

Appellant's so-called "Specification of Errors", in paragraphs 2, 3 and 4, suggests that the District Court erred in failing to grant appellant's counterclaim with respect to validity and infringement of Reichel claims 6, 11, 12

and 13 and Flosdorf and Stokes claims 4 and 5. Actually, these issues had been adjudicated between the parties in appellees' favor by the judgment on the verdict entered August 3, 1948 [R. 35] and could not thereafter be re-adjudged so long as that judgment stood. Appellant's motions for a judgment *n. o. v.* and for a new trial were denied on August 9, 1948 [R. 39-42] and an appeal from the judgment on the verdict was taken on September 2, 1948. Manifestly the District Court committed no error in a decree entered September 13, 1948 in failing to grant appellant's counterclaim with respect to these issues.

13. No error is urged with respect to the declaratory adjudication of validity of claims 1, 2 and 3 of the Flosdorf and Stokes patent and the only error urged with respect to the declaratory adjudication of validity of claims 1, 2, 3, 4, 5, 7, 8, 9 and 10 of the Reichel patent is that the District Court made an erroneous finding of fact with respect to the question of invention.

The only mention of the Flosdorf and Stokes patent in the Specification of Errors is in paragraph 4 thereof and this is expressly confined to claims 4 and 5. By long standing practice of this Court, any alleged error with respect to claims 1, 2 and 3 of the Flosdorf and Stokes patent may be deemed waived.

With respect to claims 1, 2, 3, 4, 5, 7, 8, 9 and 10 of the Reichel patent, appellant does not urge any special grounds of invalidity. Appellees did not present any special evidence confirmatory of the validity of these claims, apart from that also pertinent to the claims which appellees were urging in the law action. The file wrapper of the original Reichel patent, D. Ex. B, at pp. 74-88 does contain an affidavit showing certain advantages attained by the freezing of the material at -70°C . and the record does show that in its "Process E" appellant pays this contribution the tribute of infringement [R. 168]. Ap-

pellees placed their principal reliance on the evidence presented as to the validity of claims 6, 11, 12 and 13. So no doubt did the District Court in making its finding that the remaining claims are valid [R. 65].

In an action tried without a jury, involving the validity of a patent, the question of invention is a question of fact to be determined by the trial judge on the evidence. An excellent example of approach by a district court to the determination of such a question under the governing law of this circuit, and one noteworthy for its careful separation of law from fact, is *Reverse Stitch Mfg. Co. v. California Reverse Stitch Co.*, 81 F. Supp. 976, 978-981 (S. D. Calif. 1949).

14. The finding of the District Court that claims 1, 2, 3, 4, 5, 7, 8, 9 and 10 of the Reichel patent are valid cannot be said to be plainly erroneous.

Appellant urges that the District Court erred in finding claims 1, 2, 3, 4, 5, 7, 8, 9 and 10 of the Reichel patent valid only on the general ground that all of Reichel's claims are void for want of patentable invention. This raises a question of fact, *Faulkner v. Gibbs*, 170 F. 2d 34 (9th Cir. 1948) as to which the District Court's finding can only be set aside if plainly erroneous, *Rule 52(a), F. R. C. P.*

Far from being plainly erroneous, the District Court's finding as to these claims was made only after the jury had found claims 6, 11, 12 and 13 valid on the same evidence and after the Court itself had carefully reviewed the evidence [R. 41-42] both under the rules governing judgments *n. o. v.* and under the greater latitude permitted him on a motion for a new trial. His finding is also in accord with that of the Patent Office on both the issue and the reissue of the Reichel patent. Appellant has signally failed to carry its burden of proof with respect to the counterclaim.

D. Rebuttal.

15. The inventions of claims 6, 11, 12 and 13 of the Reichel patent are processes, properly claimed.

Appellant has ignored the proceedings below, the positions which it there took, and the appellate character of this Court in an attempt to induce this Court to pick over the bare bones of a printed record and reverse the verdict of the jury and the findings of fact of the trial judge.

What Reichel accomplished was the conversion of a process generally describable as "freeze-drying" from an elusive vision to a practical, life-saving reality. Freeze-drying embraces all processes in which a material to be dried is first frozen and, while frozen, subjected to a drying procedure. The improvements which Reichel invented were the novel combinations of specific steps to be taken in this old process which improved the results obtained and made the process practically useful, with incalculable benefit to mankind. Reichel did not invent "freeze-drying"; he did take it out of the field of the visionary and put it to the everyday service of the people [R. 93-98]. Reichel did not invent any separately new step in drying; he did invent new combinations in "freeze-drying" each such new combination contributing a useful improvement to that generally old technique [R. 98-99]. None of Reichel's claims asserts any single step as his invention; all assert new combinations.

In two of the claims charged to be infringed, claims 6 and 12, Reichel defines a process having four steps never before combined, the new result of which is materially to hasten the pre-existing freeze-drying process without danger of destroying delicate biological substances being dried. These four steps are (1) freezing, (2) subjecting the frozen material to a high vacuum while (3) heating the frozen material, (4) without melting or softening thereof.

In the other two claims charged to be infringed, claims 11 and 13, Reichel defines another process having four steps never before combined, the new result of which is to carry the degree of desiccation significantly beyond that attained by prior freeze-drying. These four steps are (1) freezing, (2) subjecting the frozen material to a high vacuum, (3) without melting or softening the solid material and (4) continuing the application of the vacuum until the material has reached a temperature substantially above its freezing point.

It will be seen that each of these four-step processes has three of the steps in common. In the commercial applications of the Reichel invention, all five steps are used in order to obtain the advantages of each of the four-step processes.

In the file wrapper of the original Reichel patent, in the last amendment, filed October 26, 1936, prior to allowance, it was pointed out that one of the fundamental questions raised was [D. Ex. B, p. 94]:

“3. Is applicant entitled to claim broadly the process of dehydration of a frozen serum or the like which involves subjecting the serum or the like to a high vacuum while in a frozen state and while exposing the container containing the frozen material to a temperature substantially above 0° C. during the dehydration, *or* at least, continuing the application of the high vacuum until the material within the container reaches a temperature substantially above 0° C., whether the container is exposed to room temperature or a warm bath during the entire period of dehydration *or* not, irrespective of whether the material is initially frozen at -20° C., or -70° C. or any other temperature?” [Emphasis added.]

An allowance of the application followed this amendment, including an allowance of claims 6 and 11 of the

original patent which are claims 6 and 11 of the reissue patent in suit.

In the file wrapper of the Reichel reissue patent the applicant's oath states that the inventions of the original patent included among others the following processing operations [D. Ex. C, p. 19]:

"2. The process of dehydrating frozen serum or other biologically active substance by subjecting the serum or other substance to a high vacuum while in a frozen state and while exposing the container containing the frozen material to surroundings maintained at a temperature substantially above 0° C. during the dehydration, *or* continuing the application of the high vacuum until the material within the container reaches a temperature substantially above 0° C., whether the container is exposed to room temperature or a warm bath during the entire period of dehydration or not." [Emphasis added.]

The alternative conjunctions emphasized in the two passages quoted make it plain that Reichel intended to claim and the Patent Office intended to allow the claim in suit to cover two separately inventive four-step processes.

Dr. Leake testified that, in his opinion, Reichel had made, with respect to freeze-drying as practiced in the pharmaceutical art, *two significant contributions* (1) the insistence upon maintaining the product in a solid state while the heat was being applied and (2) raising the temperature of the product well above the freezing point at the end [R. 98, 148-9]. Dr. Leake was called as an expert skilled in the art to which the Reichel process appertains [R. 81-83]. He was fully familiar with the actual practices of that art with respect to freeze-drying both before and after Reichel [R. 93-99, 100-101, 114-116]. It was certainly within the province of the jury which heard him testify to give the highest weight and

credence to his testimony. When Dr. Leake testified that there are five essential steps to the Reichel process [R. 84-85, 138-139], he meant that the five step process used by appellant (and all others in the industry) for producing a medically-acceptable, freeze-dried biological substance which could be safely preserved and reliably reconstituted was essential in its entirety to attain that end. He was not interpreting claims (nor was that his province or the field of his expert knowledge). He did not mean that the two "sub-combination" four-step process of the claims in suit, both of which are used in the five step procedure to which he referred, were not contributions of independent merit to the art. On the contrary, he emphatically stated on cross-examination [R. 148] that each was a "main contribution".

16. Claims to sub-combinations are legally valid and claims 6, 11, 12 and 16 of the Reichel patent are legally complete.

Under Point 5 at pages 37-42 of its Opening Brief, appellant argues that claims 6, 11, 12 and 13 of Reichel are incomplete and therefore invalid. This argument too, is based on the fallacious fact premise that five steps are essential to novelty in the Reichel process and proceeds on a further legal fallacy that since these claims included only four steps they are improper claims. Appellant disregards entirely the analysis of its own expert, Hildebrand, which reduces the Reichel commercial process to three steps [D. Ex. K-1]. The practical question, however, is not whether Hildebrand was right in saying that the process consisted of three steps or whether Leake was right in saying that the process consisted of five steps. The real question is whether the combination processes of the claims are new combinations.

Even though the Reichel commercial process includes five steps, it is entirely proper to claim any new combina-

tions of them. As stated in *Railroad Co. v. DuBois*, 12 Wall. 47, 60 (U. S. 1871):

“Undoubtedly a patentee may claim and obtain a patent for an entire combination, or process, and also for such parts of the combination or process as are new and useful, or he may claim and obtain a patent for both.”

And in the recent case of *Special Equipment Co. v. Coe*, 324 U. S. 370, 377 (1945), the Supreme Court said:

“The statutes permit, and it is the settled practice of the Patent Office, many times sustained by this Court, to allow, claims to a combination and also its subcombinations. [Citing cases.]”

The verdict below constitutes a finding that the combinations of claims 6, 11, 12 and 13 are novel and inventive. As the Supreme Court said of findings with respect to subsidiary combination claims in *Williams Co. v. Shoe Mach. Corp.*, 316 U. S. 364, 367 (1942):

“These findings are to the effect that the new combinations, while they involve old mechanical constructions, combine these in a new way so as to produce an improved result. These are findings of fact [citing cases], despite the petitioner’s apparent contention to the contrary, and we will not disturb such concurrent findings, where, as here, there is evidence to support them”.

17. Whether or not the bringing together of the recited steps of the claims of the Reichel patent constituted an inventive act and resulted in patentable combination processes or in mere aggregations is the chief contested issue between the parties and is a question of fact, not of law.

There can be no doubt that a process is patentable as a matter of law. The statute, R. S. § 4886, 35 U. S. C.

§ 31, states: "Any person who has invented * * * any new and useful art * * * may * * * obtain a patent therefor".

"A process, *co nomine*, is not made the subject of a patent in our act of Congress. It is included under the general term 'useful art'." *Corning v. Burden*, 15 How. 252, 267 (U. S. 1853).

"That a process may be patentable, irrespective of the particular form of the instrumentalities used, cannot be disputed". *Cochrane v. Deener*, 94 U. S. 780, 787 (1877).

"It seems to us that this clear and exact summary of the law affords the key to almost every case that can arise. 'Whoever discovers that a certain useful result will be produced in any art by the use of certain means is entitled to a patent for it, provided he specifies the means'. But everything turns on the force and meaning of the word 'means'. It is very certain that the means need not be a machine, or an apparatus; it may, as the court says, be a *process*'. *Tilghman v. Proctor*, 102 U. S. 707, 728 (1881).

The law being so plain that processes are patentable, the whole of appellant's argument on his points 2, 3 and 4 degenerates into an attempt to convince this Court that Reichel's processes are not patentable, *i. e.* are not new or not useful or not inventive. In order to lift itself by its boot straps above the adverse findings of the jury on these issues of fact, appellant hopefully states that there is no conflict in the evidence.

In the first place, even if there were no conflict in the evidence, unless appellant were willing to concede the ultimate inference of fact to be drawn, namely that patentable invention is present, there would be a disputed issue of fact for the jury, as we have already pointed out.

In the second place, there is conflict in the evidence requiring the weighing of statements of experts, the evaluation of the cited prior art, the determination of whether the success that followed Reichel was attributable to his claimed improvements, and the decision as to whether the steps claimed in combination mutually contribute to produce a new result or are merely aggregative of their separate results.

We will briefly review the evidence to show plainly the conflict it presented for the jury to resolve.

In the first instance, Dr. Leake testified that Reichel had made two main contributions to science [R. 148]. Dr. Hildebrand testified that had he known dried plasma to be a desirable product he could have produced it without reference to Reichel [R. 291]. That the jury chose to believe Leake, as the practical man actually in the art, is plain and, equally plainly, it was the jury's prerogative.

Again, appellant takes the five steps named by Dr. Leake as the basis of its discussion and disregards the evidence of its own expert, Dr. Hildebrand that the Reichel process was made up of three steps [R. 272-279; D. Ex. K-1].

Appellant asserts that the first four steps of Dr. Leake's five are admitted to be old and well known. But the question is not whether the individual steps are old but whether the combination of these steps, as claimed in claims 6 and 12, is old or new. The evidence not only fails to show that the combination is old but shows on the contrary that the combination is new.

Dr. Leake pointed out that the heating step, heating the frozen material while it was being dried, was described in a Morel patent for the freeze-drying of food products, particularly gluten, but in this process the heat melted the ice, which Dr. Leake pointed out was like

putting a block of ice on a hot stove and watching the water evaporate as the ice melted [R. 95]. Dr. Leake distinguished the Reichel process from such prior art heating step, with melting, by pointing out that Reichel insisted upon the importance of maintaining the product in a solid or frozen state while the heat was being applied [R. 98].

The fact that the four separate steps of the process of claims 6 and 12 were old in other combinations is not the question presented. It is rather whether the combination of these four steps in the manner in which Reichel combined them was new or old. And Dr. Leake's testimony is that the combination was new with Reichel.

Appellant also refers to the Elser patent [D. Ex. G-7; R. 681-688] as disclosing the four steps of claims 6 and 12. Appellant is in error. The Elser patent, in describing the modification in which a heating means is used, describes it for the purpose of aiding in the evaporation of liquid and not the sublimation of ice. This modification is described in the first column of page 3 of the Elser patent [R. 681] in connection with Figures 7 and 8, where the material is described as being added in liquid form with evaporation of the liquid to freeze the product and all that Elser says about his heating means is in lines 44-52 of this column as follows [R. 687]:

“So that the temperature of the product does not reach a value so low as to impede vaporization of the liquid heating means may be provided, such as the lamps 22, for maintaining a given temperature in the lower areas of the drying chamber 20 to counteract the cold transmitted to the product by the chilled top surface of the tank, and the cold caused by the evaporation of the liquids.”

So Elser is concerned with heating to aid in evaporating liquid and not in the subliming of ice from a frozen

product without melting the ice. Appellant states that Elser was before the Patent Office and was distinguished because of Reichel's different method of freezing. Appellant is in error. The fact is that Elser was distinguished on the ground that Elser did not describe the heating of the frozen product while maintaining it in a frozen state [D. Ex. B, p. 27].

Under Point 2 at pages 22-27 of its Opening Brief, appellant argues that the final step of the Reichel process as discussed by Dr. Leake is an old step in other processes and in Point 3 appellant argues that the addition of this "fifth" step to the freeze-drying process was not a patentable invention. To support its contention appellant relies on evidence not presented to the jury, classifying eight special technical publications as eligible for judicial notice equally with a standard dictionary, as the basis for asking this Court to reverse the jury on a question of fact. Appellees have never suggested that the so-called "fifth step", when isolated from the other steps of the combination claimed in claims 11 and 13, was novel *per se*. In fact, this "fifth step", when so isolated, *e. g.* as when used in drying prunes, is a conventional procedure of great age. It remained for Reichel to combine that step into freeze-drying and provide a most beneficent contribution, dried plasma.

Hildebrand recognized that nowhere in the prior art was there any description of the step of the process of claims 11 and 13 used by defendant of "continuing the vacuum until the substance attains a temperature substantially above 0°C." Thus Hildebrand testified that there were no instructions in the prior art to that effect, saying [R. 314]:

"Q. So we are agreed that there is no instruction in any of these prior patents or publications of that step of continuing the vacuum until the substance

attains a temperature substantially above zero degrees centigrade?

“A. No, that is not contained in the instruction in any of those.”

Dr. Leake had carried out the Shackell method *ante litem* [R. 95-96] and found that procedure to be not useful because it gave a product apparently dry, but which retained about 8% moisture. He said the product looked dry and felt dry but deteriorated on standing and was not satisfactory [R. 96].

Appellant argues in Point 5 that disposition of the present case requires no determination of the “abstract question as to whether matters of validity or infringement are questions of fact or law”. Appellant’s difficulty is that it seeks to have this Court substitute its judgment on the facts for that of the jury, contrary to all established rules. As the Supreme Court said in *Tennant v. Peoria & P. U. Ry.*, 321 U. S. 29, 35 (1944):

“It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. * * * That conclusion whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable”.

In the present case, the Patent Office, the jury and the trial judge have all, from substantially the same evidence, drawn the inference that the Reichel patent displays invention. This evidence may be summarized:

The Reichel claims define novel combinations of process steps;

The prior art did not successfully produce useful products;

There was a constant demand, including a World War, during the period of the prior art;

Once the Reichel invention was made, the demand was satisfied.

Can it be said that no reasonable man could infer that Reichel displayed invention? Was not the jury within its province in accepting the conclusion of Dr. Leake, that Reichel had made a great contribution to the art and in disregarding the *ex post facto* assertion of Dr. Hildebrand, that *he* could have done it if *he* had been asked? Was it callousness, stupidity or ignorance which kept plasma and other products from the medical profession for decades or was it the "flash of thought"* or the "flash of genius"*** of Reichel for which victims of shock or hemorrhage waited?

18. The proof of infringement of the Reichel patent was clear and complete and appellant's entire argument about non-infringement is a plea to this Court to reexamine questions of fact decided adversely to it by the jury.

The proof of what appellant did in freeze-drying its several freeze-dried products is clear and definite [R. 156-168]. Appellant does not contend that it does not freeze these products or that it does not subject them to a high vacuum while frozen or that it does not heat them by exposure to a source of heat well above the freezing point of materials while under the vacuum without melting the

* *Densmore v. Scofield*, 102 U. S. 375, 378 (1880).

** *Cuno Corp. v. Automatic Devices Corp.*, 314 U. S. 84, 91 (1941).

frozen material or that it does not continue the vacuum until the products have obtained a temperature substantially above their freezing point. Appellant's contention with respect to infringement is simply that appellant does not freeze most of its materials "quickly" or "substantially instantaneously" because it freezes most of its products at temperatures between $-20^{\circ}\text{C}.$ and $-60^{\circ}\text{C}.$ The question presented, therefore, is whether or not freezing at these temperatures constitutes the sort of freezing called for by the claims. This is a question of fact.

Upon this point, namely rate of freezing, Dr. Hildebrand testified extensively [R. 287-290]. He pointed out that the rate of freezing was determined by a variety of factors including the temperature of the refrigerant and the character of the heat transfer contact between it and the material to be frozen. Although Dr. Hildebrand did not consider the term "quickly" a precise one, he conceded that it was a term which had been used in the freeze-drying art as descriptive of well understood procedures [R. 298]. As we have already pointed out, these procedures described freezing with refrigerants at temperatures no lower than the range from -12° to $-20^{\circ}\text{C}.$ The Patent Office Examiner had no difficulty in understanding and using the term and in applying it to freezing carried out at about $-20^{\circ}\text{C}.$ [R. 419]. Dr. Hildebrand's testimony on this point went so far as to include the statement that the Examiner did not know what he was talking about [R. 298]. It was the jury's prerogative to conclude that the Examiner did know what he meant when he said "rapidly freezing".

In short, appellant's argument is that, although appellees showed that appellant froze its products at temperatures not higher than -20° and although appellant's own prior art references establish that such freezing was known in the art as "quickly freezing", the jury made a finding of fact of infringement so unreasonable that the trial Court should have granted a judgment *n. o. v.*

Appellant hopefully points to the evidence that certain batches of defendant's material take as long as sixteen hours to freeze [R. 340]. As Dr. Hildebrand pointed out, freezing is a phenomenon which takes place at the freezing point of the material [R. 288]. That an entire batch takes sixteen hours from the time the first material freezes to the time the last is frozen is no evidence that each bit of the material being frozen is not crossing the freezing point [R. 289] as rapidly as it would if it were a part of a smaller batch taking a proportionately smaller time to freeze as a batch. It is said that the Chinese nation marching four abreast could never march past a point, but the Chinese would not be passing that point more quickly if the tail of the column were only ten minutes away instead of lost in eternity.

Appellant also reasserts its palpably erroneous position that the Reichel patent is in some way limited to freezing at temperatures lower than -20°C . by the proceedings which took place in the Patent Office. Both the original and reissue file wrappers contain unequivocal statements by Reichel that the patent was intended to claim the processes in suit irrespective of the temperature of freezing [D. Ex. C, p. 94; D. Ex. C, pp. 18-20].

Far from asking this Court to ignore any limitation in the claims, appellees merely ask that their limitations be given the meaning which the evidence shows, and the jury must have found, to have been well established in the art.

19. The argument that claims 4 and 5 of the Flosdorf and Stokes patent are for the mere function or effect of a machine is not supported by the facts upon which the jury, properly instructed as to the law, found against appellant.

Appellees have no quarrel with the law of the cases cited by appellant. On the contrary, appellees were so satisfied with appellant's view of the law that appellees made no objection to the trial court's charge to the jury

on this point and neither did appellant. Both parties are, therefore, in accord that the issue of fact of whether or not claims 4 and 5 of the Flosdorf and Stokes patent are for the mere function or effect of the machine was given to the jury upon correct instructions.

A complete answer to appellant's argument is the fact that appellant nowhere names the machine of which the processes of claims 4 and 5 of the Flosdorf and Stokes patent are supposed to be the mere function or effect. The reason that appellant does not name such a machine is that there are a number of different machines which may be employed with equal success to carry out the pumping step of the claimed processes. One of these is the well-known steam ejector, used by appellant for the step of pumping the water vapor out of the vacuum space in its process without the use of a cold condenser or desiccant [R. 165]. Another is the specific type of apparatus invented by Flosdorf and Stokes and claimed by them in claim 3 of their patent in suit [R. 959]. That patent itself illustrates three forms of apparatus [R. 954] suitable for carrying out the invention of its process claims, although but one form of apparatus is covered by an apparatus claim.

The claims of the Flosdorf and Stokes patent are for a combination of three steps as appellant was at pains to prove [D. Ex. K-2]. This combination was novel and produced a result not thought possible by the art [D. Ex. E, pp. 60, 67].

The Supreme Court many years ago in *Cochrane v. Deener*, 94 U. S. 780 (1877), discussed the requisites of a patentable process. The claim in that case was as follows:

"The hereinbefore described process for manufacturing flour from the meal of ground wheat, by first taking out the superfine flour, and then taking out the pulverulent impurities by subjection to the combined operations of screening and blowing and afterward regrinding and rebolting the purified middlings." U. S.

Patent No. Re. 5,841 (claim reproduced in 5 O. G. 484, 21 Apr. 1874).

In holding the claim valid, the Court said (pp. 787-8):

“That a process may be patentable, irrespective of the particular form of the instrumentalities used, cannot be disputed. If one of the steps of a process be that a certain substance is to be reduced to a powder, it may not be at all material what instrument or machinery it used to effect that object, whether a hammer, a pestle and mortar, or a mill. Either may be pointed out; but if the patent is not confined to that particular tool or machine, the use of the others would be an infringement, the general process being the same. A process is a mode of treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing. If new and useful, it is just as patentable as is a piece of machinery. In the language of the patent law, it is an art. The machinery pointed out as suitable to perform the process may or may not be new or patentable; whilst the process itself may be altogether new, and produce an entirely new result. The process requires that certain things should be done with certain substances, and in a certain order; but the tools to be used in doing this may be of secondary consequence.”

The claims of the Flosdorf and Stokes patent comply in all respects with this definition of a patentable process. The facts that several different pumps, old and new, may be used to accomplish a double purpose which previously required an absorbent or condenser in addition to a pump, does not make the new step a function of the pump any more than the regrinding step of the process in *Cochrane v. Deener*, *supra*, was the function of the apparatus used for regrinding.

20. Appellant's entire argument with respect to the supposed misuse of the patents in suit is based on good law, but a complete disregard of the facts.

Under Point 14, appellant argues that the patent pool which Sharp & Dohme and Stokes formed in the field of freeze drying by the agreements in Defendant's Exhibit O [R. 768-937] eliminates all competition, present and future, between those companies. This argument is an empty one, because there is no evidence whatsoever that there ever was any competition between them or ever would be in the foreseeable future. It does not even appear from the record that Sharp & Dohme had the corporate power to engage in the machinery business or that Stokes had the corporate power to engage in the pharmaceutical business.

In fact, Sharp & Dohme is a drug house and Stokes is a manufacturer of machinery. If Sharp & Dohme, in its research program, makes discoveries useful in the manufacture of machinery, there is nothing in the public policy of the United States to compel it to go into the machinery business. If Stokes, in its research program, makes discoveries useful in the manufacture of pharmaceutical products, there is nothing in the public policy of the United States which says that it must embark independently upon operations in the unfamiliar drug trade. Appellant has been unable to point to the lessening of any competition that ever existed or that the operation of reasonable business practices might have brought into being.

If Sharp & Dohme and Stokes, two Philadelphia concerns, for their mutual benefit and to facilitate the progress of the useful arts, have entered into a cooperative research venture in a field in which their business activity was, and is, complementary, not competitive, the public policy of the patent law has been furthered, not the public policy of the anti-trust law defied. There is no harm to the public interest in providing that the fruits of that research, in the

form of patent rights, should be availed of by Sharp & Dolme in its normal field, the drug trade, and by Stokes in its normal field, the machinery trade.

Since a research program necessarily looks to the future, and since, inherently, a corporation can do research only through employees whose patent rights, in turn, must accrue to the corporation if the corporation is to benefit, the patent pool provides for the disposition of future patent rights and the securing to the corporations of the patent rights of their employees. Such provisions for assignment *in futuro* were approved in *Transparent-Wrap Machine Corp. v. Stokes & Smith Co.*, 329 U. S. 637 (1947).

It is not clear just what course appellant thinks the law required a corporation making an invention outside its normal field of business to pursue. But apparently appellant thinks it improper for such a corporation to turn for cooperation to a neighboring firm engaged in the field of that invention. On this point, a case cited by appellant as a leading one in the field of patent pools, *Blount Mfg. Co. v. Yale & Towne Mfg. Co.*, 166 Fed. 555, 557 (C. C. D. Mass. 1909) correctly states the law, in a passage partially quoted by appellant:

“It seems self-evident that a contract which is only coextensive with the monopoly conferred by letters patent, and which creates no additional restraint of trade or monopoly, does not conflict with the Sherman Act. The monopoly granted by letters patent is of a particular invention. Devices thus protected by patents are as a matter of fact in commercial competition with both patented and unpatented devices. A contract whereby the manufacturers of two independent patented inventions agree not to compete in the same commercial field deprives the public of the benefits of competition, and creates a restraint of trade which results, not from the granting of letters patent, but

from agreement. While the monopoly of the patented articles is not increased, the monopoly of the commercial field is increased by the 'unified tactics' as to prices''.

There is no evidence that Sharp & Dohme has ever manufactured any product which competed in the same commercial field with a product manufactured by Stokes. By granting an exclusive license in the machine field to Stokes, Sharp & Dohme assuredly creates no monopoly in Stokes beyond the monopoly conferred by the claims of the licensed patent. There is no evidence that any price restraint whatsoever exists in either the drug or the machine field. And assuredly, Defendant's Exhibit O provides for none.

When appellant states, as it does on page 84 of its opening brief, that a patentee "is granted no right to exclude himself, by agreement or otherwise, from competition in devices which his patent covers", appellant grossly misstates the law. If this were the law, every exclusive license agreement would be an unlawful restraint of trade. But the license agreement which the Supreme Court upheld in *Transparent-Wrap Machine Co. v. Stokes & Smith*, *supra*, as legal *per se* was an exclusive license by which the patentee was, during the life of the license, barred from competing with the licensee.

On page 88, appellant argues that the parties to the contested patent pool have employed their joint patent position to allocate to each other separate fields of manufacture. The converse of this is true. The already existing separate fields of manufacture of the parties to the pool determined the patent positions granted to them by the pool.

Appellant suggests that the case of *United States v. Line Material Co.*, 333 U. S. 287 (1948) controls the instant case. Aside from the fact that that case, as does this one, concerns a patent pool, there are no facts in common between

the two. In the *Line Material* case, the members of the pool were competing manufacturers in the same field prior to the creation of the pool and, through the pool, prices were fixed for the licensed product. In the instant pool, no price is fixed for any licensee in any line, whether pharmaceutical or machinery.

The findings of fact made by the Court below on this issue are perfectly adequate and that they were adverse to appellant is attributable only to the fact that the record is devoid of any suggestion of any damage to any public interest by the contested patent pool. It is significant that in appellant's argument there is no suggestion of any specific restraint of trade brought about by the contested pool except the rather envious one that the patents dominate the freeze-drying industry. That is not surprising when it is remembered that the pool includes the pioneer Reichel patent. The dominating position of appellees is a great tribute to the merit of the Reichel invention and in no way a reflection of any illicit fruits of conspiracy. Licenses under this dominating position have been freely available to any manufacturers on terms which both Feirer and Kerr thought unreasonably low [R. 185, 328]. See also Judge Yankwich's comment as to the intent of Sharp & Dohme and Stokes as expressed in the underlying agreements [R. 59-61].

So weak is appellant's position that at page 93 it attempts to bolster its argument that the licensing policies of appellees have created an unreasonable restraint in the industry by quoting the testimony of the General Manager of one of the appellee corporations. Certainly, Mr. Kerr said of the royalty schedule offered by appellees in 1946 that it was not reasonable [R. 328] but what he plainly meant was that the royalties were *unreasonably low*. He was asked to comment on the testimony of Dr. Feirer, who had already expressed his opinion that the royalties offered by appellees, being less than the 5% which he thought reasonable, were unreasonably low [R. 185]. No part of

appellant's argument about misuse of the patents in suit is more substantial than its transparent distortion of Mr. Kerr's testimony.

CONCLUSION

The judgment appealed from should be affirmed.

Respectfully submitted,

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No. 12083
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

CUTTER LABORATORIES, INC.,

Appellant,

vs.

LYOPHILE-CRYOCHEM CORPORATION, ESSDEE PATENTS,
INC., and TABOR-OLNEY CORPORATION,

Appellees.

APPELLANT'S REPLY BRIEF.

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FILED

SEP 1 1949



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Appellees.

APPELLANT'S REPLY BRIEF.

I.

The Scope of Review.

Appellees, in the principal argument set forth in their brief, have chosen to ignore the merits of their patents and have argued that the jury verdict forecloses review in this case. This view does not correspond with the case law set out hereinafter, and it is appellant's position that under the law controlling this case and in view of the undisputed facts and any inferences that might be drawn therefrom the case should never have gone to the jury in the first instance.

At the close of evidence, and pursuant to Rule 50 of the Federal Rules of Civil Procedure, appellant moved for a directed verdict in the instant case that claims 6, 11, 12 and 13 of the Reichel patent were invalid and not infringed, and that claims 4 and 5 of the Flosdorf *et al.*

patent were likewise invalid and not infringed. Following the verdict of the jury appellant, pursuant to said Rule 50 and pursuant to Rule 59, moved for judgment notwithstanding the verdict and, in the alternative, for a new trial. Thus was put into issue that the patents as a matter of law were invalid and that as a matter of law the patents were not infringed.

The contention in appellees' brief is that the appeal of appellant from the denial of these motions is frivolous, but appellees concede throughout their brief that if the evidence be such that in view of the applicable rules of law but one reasonable conclusion could have been reached as to the validity or infringement of the patents in suit, the case should never have gone to the jury. It is appellant's position that such is precisely the case here.

While conceding the above general rule governing disposition of the issues of validity and infringement of the patents in suit by the court and not by the jury, *Brady v. Southern R. Co.*, 320 U. S. 476, 88 L. Ed. 239, appellees propose that the verdict of the jury in this case forecloses consideration of the merits of the respective patents by this court. In reaching this conclusion appellees appear to urge that: (1) The only rules of general applicability, *i. e.*, laws, controlling jury patent litigation, are those broad Congressional enactments constituting the patent statutes themselves. (2) Any evidence whatsoever which might serve to cause a jury to infer a "pattern" falling within the broad, literal terms of the patent statutes suffices to provide that reasonable area of factual conflict exclusively the province of the jury. (3) Once the jury purports to apply these naked statutes to that "pattern," appeal is frivolous and violative of the Seventh Amendment to the Constitution.

By this reasoning appellees assert that there are three factual questions presented here: (a) the presence or absence of invention; (b) the sufficiency of the patent language for the man skilled in the art; and (c) infringement. (Appellees' Brief, p. 24.) Appellees further assert that the only rules of general applicability, that is, of law, material to these questions are the literal language of three broad statutes, R. S. §4886 (35 U. S. C. §31), covering invention; R. S. §4888 (35 U. S. C. §33), covering the sufficiency of the patent language; and R. S. §4919 (35 U. S. C. §67), covering infringement. (Appellees' Brief, pp. 14, 16 and 21.) Finally, appellees assert the existence of evidence from which the jury could have and did conclude that these statutes rendered appellant liable, stating that since the jury did so conclude examination into the actual merits of the patents concerned is foreclosed.

This court will immediately recognize the inevitable consequence of this approach of appellees which is, of course, to render the jury the interpreter of our patent statutes, a result diametrically opposed to our system of jurisprudence.

Elmendorf v. Taylor, et al., 23 U. S. 152, 6 L. Ed. 289;

Miller v. Burger, 161 F. 2d 992 (C. C. A. 9).

Appellant agrees that a fact is a demonstrable happening and is for the jury; appellant agrees that a law is a rule of general applicability. Appellant submits, however, that in designating the naked patent statutes as the only rules of general applicability controlling jury action in a patent case, appellees' argument does violence to more than 100 years of judicial consideration, construc-

tion, interpretation and definition of the aforesaid statutes and their predecessors. If appellees' reasoning were adopted generally for the disposition of jury patent litigation, the consequences would be far-flung indeed. The century of organic growth through interpretation and definition of the patent statutes which has resulted in our present body of patent law would become a nullity whenever the patent holder chose to take his patent to a jury. Those standards of invention carefully raised by our judiciary apace with the ever wider and more complete dissemination and integration of our technical knowledge would be abandoned. There would exist for every patent two franchises of exclusion of variable effectiveness. One would be in "equity," another in "law," and the economy would be reduced to a state of complete uncertainty as to where legal monopoly leaves off and where free competition begins. Further, patent litigation would become purely *inter partes* and the public, whose interest in all patents and particularly in the assertion thereof is paramount, would lose the protection of the judiciary, which protection it has always had heretofore.

Katsinger v. Chicago Metallic Mfg. Co., 329 U. S. 394, 91 L. Ed. 374;

Mercoid Corporation v. Mid-Continent Investment Company, 320 U. S. 661, 88 L. Ed. 376;

Pope Mfg. Co. v. Gormully, 144 U. S. 224, 36 L. Ed. 414.

And, finally, each patent case inevitably going to the jury, those objectives of Rule 50 of the Federal Rules of Civil Procedure as set out in *Brady v. Southern R. Co.*, *supra*, would be lost.

For the purposes of this case, however, it is unnecessary to discuss these contentions of appellees further.

The statutes which they would have nakedly submitted to the jury have been considered, construed, interpreted and defined, and from these judicial processes there have grown the patent laws, the body of rules of general applicability whose materiality here appellees' reasoning denies. These patent laws define certain standards which any patent coming before the courts must meet, and these laws have been applied as vigorously in jury cases as in any other cases.

Thus the Supreme Court, in *Market Street Cable R. Co. v. Rowley*, 155 U. S. 621, 39 L. Ed. 284, reversed judgment on a jury verdict for plaintiff in a patent case, and held that the court below erred in failing to instruct the jury that the patent in suit was void for want of patentable novelty. In reaching this view the court refused to permit the jury to decide for itself the broad proposition as to whether the facts might have established novelty and invention under the broad, undefined terms of the statute, but, rather, applied as a standard to the facts of the case the rule of general applicability that "mere carrying forward of the original thought, a change only in form, proportions, or degree, doing the same thing in the same way, by substantially the same means, with better results, is not such an invention as will sustain a patent." (155 U. S. 629.) It will be noted that in this case the one dissenting justice urged, as do appellees here, that the question was merely one for the jury, and failed to apply any legal standard whatsoever to the facts of the case.

In *The Black Diamond Coal Mining Company v. Excelsior Coal Company*, 156 U. S. 611, 39 L. Ed. 533, the court reversed a judgment for the patent owner on a jury verdict and held that under the facts the court should have directed a verdict for the defendant. The court did

not accede to the view of appellees here that infringement is to be treated as a matter of fact governed merely by the broad terms of the infringement statute (R. S. §4919, 35 U. S. C. §67), but applied to the facts the rule of law that there can be no infringement of a claim by a device which omits one of the elements of the claim.

And in *Singer Manufacturing Co. v. Cramer*, 192 U. S. 265, 24 S. Ct. 291, 48 L. Ed. 437, the court applied the familiar rule of law that words contained in a claim must be given due effect and must be construed to refer to elements in combination having substantially the form and constructed substantially as described in the specification and shown in the drawing (192 U. S. 285), reversing a judgment on a jury verdict for the patent owner and holding that under the facts the trial court should have granted a motion to direct a verdict for defendant.

Similarly, this court has never conceded that a patent need not meet the legal standards arrived at through judicial interpretation of the patent laws merely because such patent came before a jury. On the contrary, in *McRoskey v. Braun Mattress Co.*, 107 F. 2d 143 (C. C. A. 9), this court applied the rule set forth in *The Black Diamond Coal Mining Company* case, *supra*, that omission of a claimed element is fatal to a charge of infringement, and affirmed judgment of non-infringement entered upon a directed verdict for defendant. It will be noted that in that case plaintiff urged that testimony existed in the case to the effect that some of the claims in suit read upon the alleged infringing machine and that therefore submission of the issue to the jury was required. This

court rejected that contention, as it should reject comparable contentions of appellees in the instant case.

Finally, it is submitted that not only do the Supreme Court and this court refuse to eliminate from jury patent cases the interpretative standards evolved from the patent statutes by our courts, but the courts of the other Circuits likewise so refuse. In *The Alemite Company v. Jiffy Lubricator Company*, Appeals Nos. 13,835 and 13,840, the Court of Appeals for the Eighth Circuit, on August 17, 1949, in a case not yet reported, reversed a judgment on a jury verdict for plaintiff in a patent suit, ordering the District Court to enter a judgment dismissing plaintiff's claim that the patent in suit was valid and infringed. A motion of defendant for a directed verdict and a motion for judgment notwithstanding the verdict had both been denied by the court below. In disposing of the cause, the Court of Appeals stated:

"If the patent is clearly void, the verdict of the jury is, of course, of no help to the plaintiff and other questions need not be considered."

The court went on to observe that the standards of originality necessary to sustain a patent have recently been raised, citing decisions of the various circuits and of the Supreme Court, and finally said:

"Since it is our opinion that the evidence, viewed in the aspect most favorable to the plaintiff, does not sustain the conclusion that the Johnsons' contribution to the art of lubrication rose to the level of patentable invention, it is unnecessary to consider other questions."

And in *Refrigeration Patents Corporation v. Stewart-Warner Corporation*, 159 F. 2d 972 (C. C. A. 7), the Court of Appeals for the Seventh Circuit reversed a judgment on a jury verdict for the patent owner and held the patent invalid as a matter of law, applying the interpretation of R. S. §4888, 35 U. S. C. §33, laid down in *Halliburton Oil Well Cementing Co. v. Walker*, 329 U. S. 1, 91 L. Ed. 3, that the statute was not satisfied where a crucial element of the patented combination is described in the claim in terms of what it will do rather than in terms of its own physical characteristics or its arrangement in combination (and see the cases cited in Appellant's Opening Brief, p. 37).

These cases demonstrate clearly that the courts, in jury patent cases, will not look merely to the naked patent statutes as forming those legal standards by which the patent shall be measured. On the contrary, they demonstrate that those rules of general applicability found in judicial interpretation of the patent statutes and in the patent law in general shall control. Were it otherwise the mere presumption of validity attaching to every issued patent would take every case to the jury. That this is not true is manifest from the decisions above, and appellees have cited no authority whatsoever weakening said cases. The recent case of *The Alemite Company v. Jiffy Lubricator Company*, *supra*, demonstrates that patents in jury trials, as with all patents, must measure up to the standards set forth in our patent law, and appellees' patents must stand or fall on their merits.

II.

The Merits of the Case.

Tested by proper legal standards and in view of the clearly undisputed facts and any inferences which may be drawn therefrom, the judgment in the instant case is indefensible. Such judgment was on a general verdict and was in the amount of Seventy Thousand Nine Hundred and Twenty-two Dollars (\$70,922), two per cent (2%) of the total sales of the products manufactured under all of appellant's processes. Its effect is to confirm the monopoly of each of the patents in suit over each of appellant's processes, and to congeal this monopoly throughout the industry over any similar processes. It cannot be sustained if the Reichel patent is invalid, if the Flosdorf *et al.* patent is invalid, or if all the processes of appellant do not infringe both of said patents.

Appellees have been entirely unable to point out where in appellant's defenses of invalidity of the Reichel patent and of non-infringement thereof fail. Appellees have been entirely unable to point out where the defense of invalidity of the Flosdorf *et al.* patent fails. And appellees state only that some of appellant's processes have infringed said Flosdorf *et al.* patent.*

*Where a general verdict is based upon several grounds, and the several grounds are not all supported by the evidence, the Federal rule requires that the judgment on the verdict be reversed, as the reviewing court cannot know but that the verdict was based upon one or more of the unsupported grounds. *Wilmington Star Mining Company v. Fulton*, 205 U. S. 60, 51 L. Ed. 708; *Detroit, T. & I. R. Co. v. Banning*, 173 F. 2d 752 (C. C. A. 6); *Christian v. Boston & M. R. R.*, 109 F. 2d 103 (C. C. A. 2); *Buckeye Cotton Oil Co. v. Sloan*, 250 Fed. 712 (C. C. A. 8); *Patton v. Wells*, 121 Fed. 337 (C. C. A. 8). It will be noted that, in the instant case, the verdict is not such as can be affirmed in part and reversed in part.

The Reichel Patent:

To demonstrate that the Reichel patent in suit, and particularly claims 6, 11, 12 and 13 thereof, are invalid and not infringed, as tested by the law applied to the clear evidence and any inferences that might be drawn therefrom, appellant's opening brief made four points: (a) the so-called Reichel process, consisting of five steps, amounts to but the adding to an admittedly old drying process an old drying step without achieving any new function or result. Claims 6 and 12 of the Reichel patent but set forth a freeze-drying process well known at the time of the alleged Reichel invention, and claims 11 and 13 merely follow well-known freeze-drying with the well-known step of heating to dry under vacuum; (b) claims 6, 11, 12 and 13 of Reichel are incomplete, in failing to set out the five essential steps of the so-called Reichel process; (c) claims 6, 11, 12 and 13, and particularly claims 11 and 13, fail sufficiently to define the proper metes and bounds of the Reichel patent monopoly; (d) in failing to prove that appellant quickly or substantially instantaneously freezes its products appellees have failed to show infringement sufficient to support the verdict.

1. Appellees Have Failed to Point Out Wherein the So-called Reichel Process Is More Than Aggregation, Wherein Claims 6 and 12 Are Any More Than an Old Freeze-drying Process and Wherein Claims 11 and 13 Define More Than a Process Including an Old Drying Step Following an Old Drying Process.

The rule of law controlling appellant's defense of aggregation is that for invention to exist in a combination of old steps such combination must result not in a mere sum of old results, but in some new and different result.

Applying this rule to the clear facts of this case, appellant showed that beyond any reasonable doubt the so-called Reichel process did not involve invention and that claims 6, 11, 12 and 13 were invalid.

In attempting to meet this defense appellees' brief urges that Dr. Leake testified to the deficiencies of the prior art and the success of the patented process (p. 26) and that the evidence showed that whereas plasma was not available to the soldiers in World War I it was available in World War II (p. 27). Such evidence is only available to evidence invention where invention is in doubt. (*Dow Chemical Co. v. Halliburton Oil Well Cementing Co.*, 324 U. S. 320, 89 L. Ed. 973.) That is not the case here, where appellant contends that invention is lacking under the law beyond any reasonable doubt. Further, the evidence in this case falls far short of proving that commercial success which would in fact evidence invention in the proper case. While Dr. Leake testified to the use of the so-called Reichel process to freeze-dry plasma during the late war, Dr. Reichel testified [R. 207] that this was but one of the ways to distribute plasma, and the uncontroverted evidence of Dr. Ward shows that plasma itself, however distributed, was not generally accepted by the medical profession until the end of the 1930's [R. 348-353]. There was no demand for plasma during the first World War and, indeed, the record is singularly barren of any prominent commercial use whatsoever of the so-called Reichel process between 1933, the date of the alleged Reichel invention, and World War II when, and only when, there arose the demand for extensive plasma distribution.

Appellees further argue that in claims 6 and 12 of the Reichel patent Reichel defines a process having four steps

never before combined, appellees setting forth these steps as (1) freezing; (2) subjecting the frozen material to a high vacuum while (3) heating the frozen material (4) without melting or softening thereof (p. 42). The only support for this contention set forth in appellees' brief is that Dr. Leake testified that one of Reichel's significant contributions to the pharmaceutical art was his "insistence upon maintaining the product in a solid state while the heat was being applied" (p. 44); that the Elser patent [Deft. Ex. G-7, pp. 681-688] did not disclose the four steps of claims 6 and 12; and that the art did not show said steps in combination.

Concerning Dr. Leake's testimony, appellees simply ignore his admissions of record. Dr. Leake early in his testimony admitted that heating the product during desiccation was old [R. 84]. Under cross-examination, after being confronted with the prior art, he admitted that Reichel was not the first one to keep the product frozen solid during desiccation [R. 146-147]. He testified to the following question:

"Q. So then the new factor which he brought in, as I understand your testimony, was that after sublimation was complete he raised the temperature of the material so as to get this dry product? A. Yes, sir."

To the questions of the court below:

"Q. Hadn't both of those processes been discussed and some of them applied in some fields of biological drying? A. Not in the latter one at all, sir.

Q. The first one had? A. The latter one came as a considerable surprise to many of the workers in the field, that it was possible to maintain the product in a solid condition while heat was applied to it to drive off *residual moisture*." (Emphasis ours.)

(The latter answer obviously concerns the limitations of claims 11 and 13, omitted in claims 6 and 12.)

It is clear that if Dr. Leake's testimony meant anything, it meant that whereas heating while keeping the product solid under vacuum during desiccation was old, no one prior to Reichel had specified keeping the product solid as absolutely necessary to freeze drying. It is submitted that this court will readily recognize that merely emphasizing that which was old in the art does not form the basis for sustaining the patent monopoly, especially where the art, as shown clearly by the record and by appellant's opening brief, was replete with this teaching. Further, the prior art of record makes it perfectly clear that not only was every step of claims 6 and 12 set forth in the prior art, but such steps were set forth in combination just exactly as set forth in the claims. While appellees assert that the Elser modification does not set forth this process, only the most superficial reading of such patent will sustain this view. In describing the very objects and basic nature of his patented process (Elser Pat. p. 1, col. 1), Elser states that this invention is concerned with conditioning liquids and semi-solid materials without alteration in their essential properties. He states (lines 23-38):

"It has likewise been established that if, prior to and during the operation of withdrawing the water from the material, such water be segregated from the tissues and cells so far as possible, then can its evaporation occur without deterioration. To this

end, the material is, as a preliminary step, chilled below the freezing point of water; the chilling being performed expeditiously with the object of segregating the water in the form of crystals as minute as possible. *If this condition be maintained until the water has completely been removed by evaporation of these ice crystals, and if the evaporation be caused to take place expeditiously, it is certain that no deterioration will result.*" (Emphasis ours.)

He states, in describing his process, that the water vapor is evolved from the "frozen serum" (p. 1, col. 2, line 97). He thereafter describes one modification of apparatus to be used with his process and then, on page 3, describes a modification which may be used to handle larger quantities of the material. On page 3, column 1, lines 25 to 34, Elser says:

"The product to be dried is placed in the pans 21 within the drying chamber and the latter connected to the pumping apparatus by means of the conduit 3' and the entire system evacuated. As evacuation proceeds the gases contained in the product are liberated and escape with the air and when the vacuum therein reaches a certain value, boiling of the *liquid* occurs which is followed by *freezing* brought about as the result of rapid evaporation." (Emphasis ours.)

Thereafter he states (lines 44 to 52):

"So that the temperature of the product does not reach a value so low as to impede vaporization of the *liquid* heating means may be provided, such as the lamps 22, for maintaining a given temperature in the lower areas of the drying chamber 20 to counteract the cold transmitted to the product by the chilled top surface of the tank, and the cold caused by the evaporation of the *liquids*." (Emphasis ours.)

Obviously the word “liquids” as used in this paragraph designates the original product as it was before freezing and is not intended to describe the condition of the substance during desiccation; otherwise Elser’s description would mean that the material to be treated was first frozen under vacuum and then permitted to melt during desiccation, a result ridiculous in view of his description of the basic nature of his process, *i. e.*, that “this condition (frozen) be maintained until the water has *completely been removed by evaporation of these ice crystals.*” (Emphasis ours.) The fact is, as stated in the patent, Elser uses the lamps 22 to prevent the material from becoming so cold as to slow down sublimation of the ice therein. This is precisely the reason for heating in the so-called Reichel process [R. 195], and is necessary from the standpoint of time in the modification of Elser because such modification is designed to desiccate “larger quantities of the mixture” (p. 3, col. 1, line 13).

And if the Elser disclosure were not enough, resort may be had to Defendant’s Exhibit F-14 [R. 597]. Here Craigie, writing for the British Journal of Experimental Pathology, sets forth [R. 598, 599] the freeze drying of guinea pig serum. He states that the complement is frozen while being subjected to a high vacuum, that the apparatus is left at room temperature and that the complement will remain frozen until dry as a result of the evaporation of the water. Thus, the four steps stated by appellees to be defined in claims 6 and 12 are present in Craigie in precisely the combination of Reichel. These steps (Appellees’ Brief p. 42) are (1) freezing (found in Craigie), (2) subjecting the frozen material to a high vacuum (found in Craigie), (3) while heating the frozen material (Craigie exposes his desiccating container to the atmosphere as specified in claims 6 and 12), (4) without

melting or softening thereof (Craigie describes how the vacuum evaporation of the water automatically keeps it several degrees below 0°C.). The fact that Craigie places his material in a dish supported by a wire frame within the desiccating container to partially isolate the substance from heat conduction does not mitigate from the fact that the container is exposed to the atmosphere, thus permitting the material to receive heat through radiation. If Craigie had desired to avoid all heat addition to the material and thus slow desiccation, he would have used a refrigerant bath about the container, as did Shackell [Deft. Ex. F-5, R. 533].

Finally, appellees assert patentability for claims 11 and 13, stating that the four steps therein set forth constitute a process never before combined, and that in this process Reichel was the first to combine the "fifth step," *i. e.*, that of finally heating the desiccated product to above 0°C. under vacuum in the freeze drying process. Appellees' brief admits that such fifth step is not new *per se* (Brief p. 50), but appellees point to the fact that Dr. Leake testified that this fifth step was a contribution of Reichel (p. 44) and that Dr. Hildebrand admitted it was not shown with freeze drying in the prior art (p. 27).

It is submitted that appellees misconceive the entire purport of the law on aggregation and the cases setting forth this principle. To sustain claims 11 and 13 the alleged process therein set forth must be shown to have resulted in something new and different. As shown by the authorities cited in appellant's opening brief, a mere aggregation of result is not sufficient. In the instant case claims 11 and 13 but set out the old freeze drying process, and thereafter set forth that the product should be heated under vacuum to above 0°C. This was shown in

appellant's opening brief to be but drying by an old process and drying further and more completely by adding an old vacuum drying step, admittedly known long prior to Reichel. Nothing appellees have said and no evidence to which appellees have been able to refer shows wherein any result different in kind is achieved in the asserted combination of steps of claims 11 and 13. No authority has been cited by appellees which meets appellant's showing of non-inventive aggregation. To urge that the combination defined in claims 11 and 13 is simply a new combination merely begs the question, and it is submitted that these claims merely set forth an aggregation and, along with claims 6 and 12 and along with the other claims of the Reichel patent purportedly setting forth the so-called Reichel process are clearly and beyond any reasonable doubt invalid.

2. Appellees Have Failed to Point Out Why Claims 6, 11, 12 and 13 of the Reichel Patent Should Not Be Declared Invalid as Incomplete, in Failing to Set Out the Five Essential Steps of the Reichel Process.

Appellees' entire case on the validity of the Reichel patent was based upon the extolling by Dr. Leake of the so-called Reichel process, a process which Dr. Leake testified unequivocally consisted of five steps, all essential to obtaining a satisfactory lyophilized product [R. 132]. Nowhere did Dr. Leake testify as to any practicable value, merit or contribution by Reichel existing in two separate and distinct processes not including all the five steps of the Reichel process. When Dr. Leake stated [R. 148] Reichel made two main contributions, he was talking about one single process, the five-step Reichel pro-

cess, and nothing stated by any of the other witnesses at the trial can be used as a basis for distinguishing the instant case from *Graver Tank and Mfg. Co. Inc., v. Linde Air Products Co.*, 93 L. Ed. Adv. Op. 492, cited previously by appellant.

Appellees can only urge that Dr. Hildebrand stated the process consisted of three steps, and that the authorities show that sub-combination claims are proper. So far as concerns Dr. Hildebrand's testimony, he was testifying as to the Reichel patent disclosure as compared with the prior art and corresponding steps of appellant's processes, and not as to what was essential to the preparation of a successful lyophilized product by the so-called Reichel process. Nor was he testifying whether claims 6, 11, 12 and 13 set forth the steps designated by Dr. Leake without contradiction as essential [R. 270]. So far as concerns the authorities cited by appellees, which admittedly justify in the proper case sub-combination claiming, these cases are simply not in point here. The material issue is whether or not the claims of the patent sufficiently define those steps essential to the process which Dr. Leake testified made it possible to obtain a satisfactory lyophilized product. Appellees have pointed to not one iota of evidence from which it could be inferred that Reichel's process could result in a satisfactory lyophilized product in the absence of those steps omitted in claims 6, 11, 12 and 13. It is submitted, therefore, that beyond any question of doubt those claims are incomplete under the law and therefore are invalid.

3. Appellees Have Failed to Point Out Wherein Claims 11 and 13 Should Not Be Held Invalid as Failing to Define the Metes and Bounds of the Reichel Monopoly and as Therefore Vague and Indefinite Under the Applicable Rules of Law.

Appellees state that there is evidence to support the conclusion that the Reichel patent complies with every requirement of R. S. §4888, 35 U. S. C. A. §33, but what this evidence is and how any inference can be drawn therefrom that the metes and bounds of the Reichel monopoly are sufficiently defined in the claims in issue as required by the cases heretofore cited by appellant appellees do not say. From appellees' argument it can only be concluded that appellees urge that this court hold that the step of quickly or instantaneously freezing need not be susceptible of definition at all.

In its opening brief appellant pointed out how not a single witness was able to specify what instantaneous freezing meant and whether, in a given situation, such freezing would be present or would not be present. (Appellant's Brief pp. 45, 46 and 47.) Appellees refer only to the testimony of Dr. Leake at R. 134, but it is impossible to infer anything from this testimony but that Dr. Leake simply was unable to ascertain what would be instantaneous freezing and what would not be instantaneous freezing. Indeed, Dr. Leake's testimony as to this point given at R. 134-137 was summed up by Dr. Leake when he testified, at R. 137:

"* * * You would say that isn't necessary to the Reichel process, would you, Doctor? A. What?

Q. What I read. I mean this instantaneous freezing. A. I don't think that is an essential feature of the Reichel process. The essential feature of the Reichel process is to freeze the product."

Despite the specifications of the patent in suit, which refer to instantaneous freezing no less than five times, and despite that claims 11 and 13 of the patent expressly set out such instantaneous freezing, this appears also to sum up the argument of appellees, namely, that the step of instantaneous freezing is not essential to said claims.

Indeed, that claims 11 and 13 are hopelessly deficient in setting forth the metes and bounds of the claimed patent monopoly is emphasized by appellees' argument on the issue of infringement, to be considered in the next section of this brief. This argument rejects every attempt of appellant to find some standard in the patent claims which might be applied to appellant's processes, but offers none of its own.

Claims 6 and 12 of the Reichel patent specify "quickly freezing" and claims 11 and 13 specify "instantaneous freezing." If indeed the term "quickly freezing" is susceptible of any definite interpretation such claims are clearly invalid as defining an old process in view of the Elser patent and the Craigie article, and for the reasons set forth hereinabove. The metes and bounds of claims 11 and 13, which specify "instantaneous freezing" are impossible to ascertain, and these claims are, beyond any question of doubt, invalid as indefinite.

4. Appellees Have Failed to Point Out Wherein Any Inference Can Be Drawn From the Proofs That Would Establish Infringement of Claims 6, 11, 12 and 13.

In its opening brief appellant attempted to set forth some possible standard whereby the claims of the patent in suit might be applied to appellant's processes. The testimony of Drs. Leake and Hildebrand was of no assistance in this matter, as neither could define what the terms quickly and instantaneously freezing meant. Dr. Reichel, although unable to definitely apply his test, stated that he meant by instantaneous or rapid freezing freezing as fast as possible. And resort to the specifications of the patent itself construes the terms to mean, if anything, freezing in instalments or by rotation at a temperature far below the freezing point of the material, *i. e.*, about -70°C . or below the temperature of dry ice, in order that the component parts of the colloidal system be permanently fixed and that the structure of the colloidal particles remain apparently unchanged.

Appellant showed how the great majority of appellant's processes fulfilled none of these conditions and how no process of appellant fulfilled all of these conditions, and urged that appellees had beyond any question of doubt failed in their proofs of infringement.

Appellees in their brief take the position simply that upon the admission by appellant that all of its freezing was at temperatures not higher than -20°C . it cannot be said the jury acted unreasonably in finding that such freezing met the requirements of the claims in suit. In view of the well settled law that omission of an element of a claim avoids infringement, appellant submits that the issue of infringement should never have gone to the jury.

In order to determine whether or not appellees' case on infringement was entitled to go to the jury, it was the duty of the court below first to construe the terms "quickly" and "instantaneous" freezing in the claims. This was but a matter of construction of the patent document and was not within the province of the jury. (*Doble Engineering Co. v. Leeds & Northrup Co.*, 134 F. 2d 78 (C. C. A. 1); *Motor Wheel Corporation v. Rubsam Corporation*, 92 F. 2d 129 (C. C. A. 6); *Burroughs Adding Mach. Co. v. Rockford Milling Mach. Co.*, 292 Fed. 550 (C. C. A. 7). Thereafter it was the duty of the court below to examine the proofs and determine whether those proofs permitted any reasonable inference that appellant's processes came within the terms "quickly" and "instantaneous" as construed by the court. The court below failed to set out any construction of these terms [R. 973-999], and in view of such failure this function must be performed by this court. (*Refrigeration Patents Corporation v. Stewart-Warner*, 150 F. 2d 972 (C. C. A. 7).)

As stated above, appellant has suggested in its opening brief that if it is possible to ascertain the meaning of the aforesaid terms their meaning is established by the specification of the patent and by the patentee himself, which is instalment or rotation freezing in as short a time as possible by the use of a refrigerant at temperatures far below 0°C. Appellees, on the other hand, suggest no possible definite meaning for the terms.

Appellees in their brief merely say, first, that claim 11 of the Reichel patent specifies one way of freezing, *i. e.*, "by indirect contact with a refrigerant maintained at a temperature below the freezing point" (p. 31). Such statement is manifestly misleading. Freezing by indirect contact with a refrigerant could be slow freezing, medium

freezing or instantaneous freezing, and the fact of indirect contact has nothing to do with the rate of freezing itself.

Second, appellees argue that the time of freezing has nothing to do with the matter inasmuch as a large batch of material subjected to the same conditions as a smaller batch would, of course, take longer to freeze (pp. 31 and 54). Appellees' observations regarding the Chinese nation seem to urge that any freezing is instantaneous and to reject entirely the emphatic teachings of the Reichel patent itself. This appears to but reiterate the proposition that quickly or instantaneous freezing may be read out of the claims entirely. Besides the obvious fact that the terms "quickly" and "instantaneous" are terms of time duration, the answer to this argument is that the patent itself specifies that freezing take place in instalments or by rotation, thus bringing about the instantaneous freezing of small amounts of the material at a time, and the patent nowhere suggests freezing large batches simultaneously. If appellant were practicing the method of the patent in suit, as appellees assert, the proof should show more than that but one of appellant's 13 products was frozen by rolling, and that none of appellant's 13 products was frozen by instalments.

Third, appellees present, as evidence of what the term "quickly" means, prior art, such as the Elser patent, describing freezing with a refrigerant between -12° and -20°C . as "rapid freezing" (p. 31), but in the very prosecution of the Reichel patent it was urged that the -20°C . freezing of the Elser process was "slow freezing," whereas applicant's process constituted "rapid freezing" [Deft. Ex. B, R. 412]. Further, as the specifications of the Reichel patent make clear, the temperature

of the refrigerant used is but one of the factors in quickly or instantaneously freezing. For example, the freezing of a roomful of material by subjection of that material to a single pipe running through its mass carrying a -70°C . refrigerant would take considerable time, if it could be accomplished at all, whereas splashing of a droplet of the mass on such pipe, even were the refrigerant at a considerably higher temperature, would certainly result in a freezing of such droplet in immeasurably less time. This is what the Reichel patent means by instalment freezing. And, finally, claims 11 and 13 of the Reichel patent specify neither “rapidly” nor “quickly.” They specify instantaneously.

Fourth, appellees argue that Dr. Hildebrand admitted that in the frozen food industry the term “quick frozen” has a definite meaning (pp. 30, 31 and 53). Reference to Dr. Hildebrand’s testimony in the record will demonstrate the fact that Dr. Hildebrand made no such alleged admission, were such admission material here [R. 298].

And, finally, appellees urge that since some of the claims of the Reichel patent specify -70°C . for the refrigerant, the patentee, Reichel, must have meant something different in claims 6, 11, 12 and 13 (p. 31). Doubtless Dr. Reichel did indeed mean something different. He testified that he meant as fast as possible [R. 196]. But aside from Dr. Reichel’s testimony appellees offer no suggestion whatsoever as to what the terms “quickly” and “instantaneously” do mean in claims 6, 11, 12 and 13.

It thus appears that nothing offered by appellees in their brief is of assistance in the ascertainment of just what the aforesaid limitations in the Reichel claims mean. It also appears that appellees have suggested nothing to rebut the plain showing of appellant that its processes do

not fall within any possible definitely ascertainable construction of the said terms. From the standpoint of time appellant has demonstrated that the proofs do not show that its products were frozen either quickly or instantaneously, Penicillin, representing 75% of the total sales of appellant, being frozen in times ranging from 2 to 16 hours. From the standpoint of manner of freezing, appellant has shown that but one of 13 of its products was frozen by rotation and none by instalments, and from the standpoint of refrigerant temperature appellant has shown that but 1/50th of its products were subjected to the -70°C . temperature. Beyond any reasonable doubt appellees' case of infringement has failed.

Flosdorf, et al., Patent:

Nothing has been said by appellees which might justify the sending to the jury of the issue of validity of claims 4 and 5 of the Flosdorf *et al.* patent. Appellees only urge that the consideration of the merits of the Flosdorf *et al.* invention before the Patent Office was very thorough and that appellant nowhere names the machine of which the processes of claims 4 and 5 of the Flosdorf *et al.* patent are supposed to be a mere function or effect. Appellees misinterpret appellant's position. Appellant pointed out in its opening brief that claims 4 and 5 merely set out the function and effect of the apparatus disclosed in the Flosdorf *et al.*, patent. that all the witnesses agreed that the step in the patent of removing the vapor from the vacuum chamber without condensing it in a cold condenser or in a chemical desiccant merely de-

scribed the function of the pumps Flosdorf disclosed in his patent, and that on their faces claims 4 and 5 of the patent but describe the very object or result which the patent description itself specified as the object of the alleged invention, *i. e.*, to desiccate without using a cold condenser or a chemical desiccant. Appellees' observation that the combination of the Flosdorf *et al.* patent was novel and produced a result not thought possible by the art does not mitigate from the fact that claims 4 and 5, under the law, may not claim such result. The result which the patent on its face asserts was thought impossible was desiccating without a cold condenser or a chemical desiccant, precisely that which Flosdorf claimed. Whether the particular pumps of Flosdorf may or may not have permitted use of a lower vacuum during freeze drying is immaterial. The subject is not mentioned in the record, in the claims, or in any way in connection with appellant's processes.

Claims 4 and 5 of the Flosdorf *et al.* patent are so plainly invalid as to merit no further discussion.

III.

Misuse of the Patents in Suit.

Appellees concede on page 57 of their brief that appellant's misuse argument is based upon good law. In an attempt to establish that the patents in suit have not been misused, however, appellees set forth a number of facts which they contend render the rules of law urged by appellant inapplicable. Appellees urge:

1. That the principals of the patent pool were not in active competition at the time the pool was formed.
2. That the evidence fails to establish that competition was lessened or destroyed by the patent pool.
3. That appellees' licensing program is nonrestrictive and non-discriminatory.
4. That appellees' patent pool furthered the public policy of the patent laws.
5. That since the creators of the instant patent pool were not present competitors and since price fixing is absent, *United States v. Line Material Co.*, 333 U. S. 287, 92 L. Ed. 701, is not applicable here.

Appellant will show that the first of these propositions is utterly immaterial, that the second is not only immaterial but, in addition, is not supported by the record, that the third has no bearing on the questions presented, that the record before the court in no way justifies the fourth, and that the fifth represents misunderstanding of the cited authority.

1. Whether or Not the Principals to the Patent Pool Were in Active Competition at the Time the Patent Pool Was Formed Is Immaterial to Their Patent Misuse; the Pool and Agreements on Their Face Restrain Potential Competition and Are Illegal Per Se.

As their principal argument appellees urge throughout their brief that their patent pool does not violate the antitrust laws nor constitute a misuse of their patents inasmuch as prior to the questioned agreements the parties thereto were not in active competition with each other. It is apparently appellees' contention that, so long as the parties to a combination are not at the time of the formation of that combination in actual and active competition, such combination does not fall within the scope of the antitrust laws. Appellees cite no authority whatsoever for this proposition and it is not the law. It has been repeatedly held that a combination whose purpose or effect is to impede potential or future competition is prohibited by the antitrust laws. Thus, in *United States v. Griffiths*, 334 U. S. 100, 92 L. Ed. 1237, the Supreme Court had before it an agreement between Moving Picture Theatres Owners wherein:

"With minor exceptions the theatres which each corporation owns do not compete with those of its affiliates but are in separate towns." 334 U. S. 102, 92 L. Ed. at 1240.

Despite this fact the Court held:

"It is indeed 'unreasonable, *per se*, to foreclose competitors from any substantial market.' *International Salt Co. v. United States*, 332 U. S. 392, 396, *ante*, 20, 26, 68 S. Ct. 12. The anti-trust laws are

as much violated by the prevention of competition as by its destruction. *United States v. Aluminum Co. of America (F) supra.*” 334 U. S. at 107, 92 L. Ed. at 1243.

And in *American Tobacco v. United States*, 328 U. S. 781, 90 L. Ed. 1575, the Supreme Court said:

“On March 26, 1945, this Court granted the petitions but each was ‘limited to the question whether actual exclusion of competitors is necessary to the crime of monopolization under Sec. 2 of the Sherman Act’.” 328 U. S. at 784, 90 L. Ed. at 1580.

Answering this question the Court held:

“Prevention of all potential competition is the natural program for maintaining a monopoly here, rather than any program of actual exclusion. ‘Prevention’ is cheaper and more effective than any amount of ‘cure’.” 328 U. S. at 797, 90 L. Ed. at 1587.

In a recent case by the Court of Appeals for the Second Circuit, Judge Learned Hand said:

“* * * and, so far as concerns the public interest, it can make no difference whether an existing competition is put an end to, or whether prospective competition is prevented.” *United States v. Aluminum Co. of America*, 148 F. 2d 416, 429.

It should be noted that the Supreme Court in the *American Tobacco Co.* case, *supra*, not only cited the *Aluminum Company* case with approval, but emphasized that the unique nature of the proceedings therein added to its weight as a precedent.

Actual or present competition between the contracting parties has never been held to be a condition precedent to

patent misuse. This court has recently had before it a case involving an agreement held to have constituted a patent misuse wherein the parties to the agreement were not competitors. *McCullough v. Kammerer Corp., et al.*, 166 F. 2d 759. In that case one of the parties to the agreement, Kammerer, was merely a patent holding corporation, while the other party to the agreement, Baash-Ross, was a manufacturer. As pointed out in the dissenting opinion:

“The admitted fact is before us that Kammerer never had a field of operations and it never competed or attempted to compete with anyone. It was apparently a ‘paper corporation’ expressly created for the one and only purpose of holding the Kammerer patent or patents here involved—it was not, and never was, a manufacturing and/or selling company.” 166 F. 2d at 768.

In discussing this case, appellees’ brief erroneously states (p. 35) that the corporation was formed “by concert among competitors.”

As clearly established by the above authorities, however, the antitrust laws are applicable to combinations which are intended to, or which do, prevent future competition as well as to those which suppress existing competition. The repeated urgings by appellees in their brief that Sharp & Dohme and Stokes were not competitors at the time their patent pool was formed have, therefore, no bearing whatsoever on the questions here presented.

2. The Facts Before This Court Show That the Pool and Agreements Do Lessen and Destroy Competition, Although Such Showing Is Unnecessary Where the Said Pool and Agreements Are Illegal on Their Face.

Appellees' brief urges that the misuse defense must fail inasmuch as the record fails to show specific instances of the lessening or removal of competition due to the patent pool. It is apparently appellees' contention that absent the proof of such instances a patent misuse defense must fail. This is not the law. That an agreement on its face may violate the antitrust laws or constitute a patent misuse has long been settled. It was under such circumstances that this court decided the case of *McCullough v. Kammerer Corp.*, *supra*.

In its opening brief appellant has shown that the purpose and effect of the appellees' patent pool was to eliminate all competition, present and future, between the patent owners, to allocate to each separate fields of operation within the industry and to be self-perpetuating. Such an agreement, on its face, violates the antitrust laws and constitutes a misuse of the patents involved.

In addition, the facts before this court amply demonstrate that appellees' combination has suppressed competition and has restrained trade. As shown by the agreements themselves and as pointed out in appellees' brief, the research activities of the parties to the agreements overlapped (p. 37). Each of the principals to the pool was actively engaged in research in the field of the other. The efforts of each party could well be expected to and did result in patentable inventions in the field of the other. Were either of the parties to make an important invention in the other's field the protection offered by a patent covering such invention would be the strongest incentive for ac-

tually entering that field. Yet, as pointed out by appellees in their brief, the principals in the pool "are not now competitors" (p. 36). The pooling agreement insured such result.

Further, were any showing of specific trade restraint necessary other than the obvious division of the field of competition, the dominance of appellees in the freeze drying industry provides such showing. Appellees admit their dominance and assign its existence to their patents. In this appellees misconceive the purport of appellant's argument. Appellant's position is that it is unlawful and a patent misuse for patent owners to combine and pool their patents where such pooling results in domination of the particular industry. This even in the absence of a division of the field between the parties such as here took place.

Demonstrating appellees' misunderstanding of the consequences of its monopoly are the statements in appellees' brief relating to the testimony of Mr. Kerr (p. 60). Appellant's reference to such testimony was to show how a dominant combination had within its power the ability to arbitrarily fix prices through the setting of royalty rates, whether such royalties be high or low. The iniquity is not in the price of the royalty, it is in the power to fix such prices.

Thus, even were the facts of actual restraint as set forth hereinabove missing, appellees' pooling of their patents to attain a position of monopolistic domination of the industry is illegal, whether or not the actual royalty charges leveled against the industry be high or low.

As stated by the Supreme Court in *American Tobacco Co. v. United States*, 328 U. S. 780, 811, 90 L. Ed. 1594-1595:

“It is undoubtedly true * * * that trade and commerce are ‘monopolized’ within the meaning of the federal statute when, as a result of efforts to that end, such power is obtained that a few persons acting together can control the prices of a commodity moving in interstate commerce. It is not necessary that the power thus obtained should be exercised. Its existence is sufficient. *United States v. Patten* (C. C.) 187 F. 664, 672, reversed on other grounds in 226 U. S. 525, 57 L. Ed. 333, 33 S. Ct. 141, 44 L. R. A. (N. S.) 325. Cf. *North American Co. v. Securities & Exchange Commission*, 327 U. S. 686, *ante*, 945, 66 S. Ct. 784.”

(See also *Fashion Originators' Guild v. Federal Trade Com.*, 312 U. S. 457, 467, 85 L. Ed. 949, 954.)

And in *Associated Press v. United States*, 326 U. S. 1, 12, 89 L. Ed. 2013, 2026, the court said:

“Combinations are no less unlawful because they have not as yet resulted in restraint. An agreement or combination to follow a course of conduct which will necessarily restrain or monopolize a part of trade or commerce may violate the Sherman Act, whether it be ‘wholly nascent or abortive on the one hand, or successful on the other’.”

3. Whether or Not Appellees' Licensing Program Is Non-restrictive and Non-discriminatory Is Immaterial to the Issue at Hand.

Appellees urge that their licensing program is nonrestrictive and nondiscriminatory. Appellant has established that the formation of the patent pool itself violated the antitrust laws and constituted a misuse of the patents. Appellant further has established that the division of the field between the principals to the pool is illegal in and of itself. So long as appellees continue to operate under the agreements creating such pool they cannot maintain any action for infringement of their patents. The licensing policy of the parties to the agreement subsequent to the formation of the pool has no bearing whatever on the legality of the agreements under which they operate. Appellant knows of no cases, and appellees have cited none, where an illegal patent pool or restrictive agreement among patent owners has been sanctioned simply because its current licensing program was nonrestrictive and non-discriminatory.

4. The Record Before the Court Does Not Support Appellees' Assertion That the Patent Pool Furthered the Public Policy of the Patent Laws.

Appellees' brief (p. 57) characterizes the patent pool as "a co-operative research venture" and urges that such venture has furthered the public policy of the patent law. Appellees' contention appears to be that their patent pool, in some unexplained manner, increased the research activities of the parties thereto. There is nothing in the series of agreements or in the record which even remotely supports such a contention.

Again, appellees' brief urges (p. 37) that inasmuch as the research activities of the parties prior to the agreement resulted in the making of inventions in each other's field, under such circumstances a patent pool was not only permissible, but desirable. In support of this proposition appellees cite the case of *Standard Oil Company v. United States*, 283 U. S. 163, 75 L. Ed. 926. If the mere fact that parties to a patent pool were engaged in research in a common field were sufficient to justify such pool the anti-trust laws would obviously have little or no application to patent pool combinations. The *Standard Oil Company* case, rather than supporting appellees' contention, opposes it. The case goes no further than to hold that where patent owners have conflicting claims or threatened interferences, a patent pool formed to resolve their disputes is not conclusively illegal, provided that the members of the pool do not dominate their particular market. In the instant case, appellees have failed altogether to establish that there were any patent disputes between the parties to the pool and admit domination of the field.

Next, appellees' brief urges (p. 37) that the patent pool "opened up to the entire pharmaceutical industry the processes and products patented." This contention is similarly without foundation. It nowhere appears in the record how the pharmaceutical industry in any way benefited from the formation of the patent pool. On the contrary, the pool has resulted in an admitted patent domination of the field and has given the participating parties thereto the absolute and arbitrary power to jointly set the royalties throughout the industry.

5. **United States v. Line Material Co.**, 333 U. S. 287, 92 L. Ed. 701, Controls Here, Regardless of Whether Active Competition Existed Between the Parties to the Pool and Regardless of Whether Under the Pool Prices Have Been Finally Fixed.

Appellees seek to summarily distinguish the instant case from the *Line Material* case on two grounds. First, that in that case the members of the patent pool were competing manufacturers prior to the creation of the pool; second, that through the pool prices were fixed for the licensed product.

Appellant has herein shown that the mere fact that prior to the formation of a combination among traders they were not in active competition with each other will not remove such combination from the scope of the anti-trust laws. As regards the fixing of prices of the licensed product in the *Line Material* case, appellees have chosen to ignore entirely the postulate that any combination which eliminates all competition among its members must necessarily eliminate price competition. This is made clear by the Supreme Court of the United States in *American Tobacco Company v. United States*, 328 U. S. 781, wherein the Court states, 328 U. S. at 813, 90 L. Ed. at 1596, quoting from *United States v. Aluminum Co. of America*, 148 F. (2d) 416:

“Starting, however, with the authoritative premise that all contracts fixing prices are unconditionally prohibited, the only possible difference between them and a monopoly is that while a monopoly necessarily involves an equal, or even greater, power to fix prices, its mere existence might be thought not to constitute an exercise of that power. That distinction is nevertheless purely formal; it would be valid only so long as the monopoly remained wholly inert; it would dis-

appear as soon as the monopoly began to operate; for, when it did—that is, as soon as it began to sell at all—it must sell at some price and the only price at which it could sell is a price which it itself fixed. Thereafter the power and its exercise must needs coalesce. Indeed it would be absurd to condemn such contracts unconditionally, and not to extend the condemnation to monopolies; for the contracts are only steps toward that entire control which monopoly confers: they are really partial monopolies. *Id.*, 427, 428.”

The simple fact is that in the *Line Material* case the parties pooled their patents and then eliminated one element of competition between themselves by fixing prices; here the parties pooled their patents and then totally obliterated any competition whatsoever between themselves by dividing the field into exclusive spheres of activity.

6. Appellees Have Wholly Failed to Justify the Provisions of Their Agreements Providing for the Perpetuation of the Pool.

Finally, respecting the scheme to perpetuate the patent concentration of the pool, appellees' brief merely states (p. 58) that, since a research program necessarily looks to the future, the patent pool provides for the disposition of future patent rights. Such statement is applicable to any scheme for perpetuation of patent domination, is no answer to the authorities cited in appellant's opening brief, and in no way justifies either the pool, the illegal agreement, or the perpetuation thereof.

Respectfully submitted,

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No. 12,083

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CUTTER LABORATORIES, INC.,

Appellant,

vs.

LYOPHILE-CRYOCHEM CORPORATION, ESSDEE PATENTS,
INC., and TABOR-OLNEY CORPORATION,

Appellees.

APPELLANT'S PETITION FOR REHEARING.

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No scintilla of proof exists that appellant's slow freezing either accomplishes the result of the quick or instantaneous freezing of the patent, or accomplishes said result in the same or substantially the same way; on the contrary, the evidence shows the appellant's slow freezing does not produce the result taught in the Reichel patent..... 19

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The holding of this court that the validity of claims 4 and 5 of the Flosdorf, et al. patent lies in the fact of combination, rather than the novelty of any particular element, still compels the conclusion that said claims are invalid as failing to claim the combination and instead claim the result or function of said combination..... 25

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No. 12,083

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CUTTER LABORATORIES, INC.,

Appellant,

vs.

LYOPHILE-CRYOCHEM CORPORATION, ESSDEE PATENTS,
INC., and TABOR-OLNEY CORPORATION,

Appellees.

APPELLANT'S PETITION FOR REHEARING.

Now comes Cutter Laboratories, Inc., appellant herein, and petitions the Court for a rehearing in this cause.

In its decision affirming the judgment of the lower court as to claims 11, 12 and 13 of Reichel Reissue Patent No. Re. 20,969, this Court held that penicillin, the product constituting 79% of appellant's allegedly infringing sales, was not frozen quickly or substantially instantaneously, as required by the claims. Nevertheless, this Court held that appellant has substituted an equivalent step, slow freezing, and thus infringed upon the claims. Prior to this holding the question of possible equivalency of appellant's slow freezing to the quick or substantially instantaneous freez-

ing of the patent had not been considered either by appellant or appellees, and had been mentioned neither in the briefs preceding the hearing nor at the hearing itself. Indeed, to appellant's argument in its opening brief that quick or substantially instantaneous freezing in the patent claims, as interpreted by the description and by the evidence in the case, did not cover appellant's processes, appellee urged only that the jury below had decided appellant's processes to be quick or instantaneous freezing, and that the jury verdict could not be upset by this Court. The question of the applicability of the doctrine of equivalents to appellant's freezing methods having entered this appeal for the first time in the opinion of this Court, appellant respectfully submits that it should be given opportunity to argue the question upon rehearing.

Further, it is submitted that this Court based its consideration of plaintiffs' argument that claims 4 and 5 of Flosdorf, *et al.*, Patent No. 2,345,548 are invalid as claiming a result or function upon a misconception of the nature of such argument. Appellant does not contend that the invention in this patent lies in new types of pumps, but rather that, conceding the invention in these claims to lie in the concept of combining certain pumps with apparatus for desiccating frozen biological products, the patentees failed to claim the combination they were entitled to patent and instead claimed the function or result of this combination.

The grounds, therefore, of this Petition are:

(1) The specifications and teachings of the Reichel patent make quick or substantially instantaneous freezing mandatory in the Reichel process and fail to provide any basis whatsoever for an application of the doctrine of equivalents, which reads out of the express language of the claims that which differentiates appellant's processes from the patented process.

(2) Even if the doctrine of equivalents could in this case operate to ignore the express limitation of the claims, the existence of such equivalency must be proven.

(3) No scintilla of proof exists that appellant's slow freezing either accomplishes the result of the quick or instantaneous freezing of the patent, or accomplishes said result in the same or substantially the same way; on the contrary, the evidence shows that appellant's slow freezing does not produce the result taught in the Reichel patent.

(4) The holding of this Court that the validity of claims 4 and 5 of the Flosdorf, *et al.* patent lies in the fact of combination, rather than the novelty of any particular element, still compels the conclusion that said claims are invalid as failing to claim the combination and instead claim the result of function of said combination.

I.

The Specifications and Teachings of the Reichel Patent Make Quick or Substantially Instantaneous Freezing Mandatory in the Reichel Process and Fail to Provide Any Basis Whatsoever for an Application of the Doctrine of Equivalents, Which Reads Out of the Express Language of the Claims That Which Differentiates Appellant's Processes From the Patented Process.

The Reichel patent in suit consists of one page of drawings, three pages of description and thirteen claims. This Court has held valid and infringed claims 11, 12 and 13 of the patent, which specify substantially instantaneous or quick freezing as the original step of appellees' process. The patentee's description of his invention commences with the usual statements relative to the difficulties occasioned by prior workers in the field and the broad observation that the patentee's invention overcomes these objections. Thereafter, the patentee in his statement of invention commencing on page 1, col. 2, line 17, of the patent states unequivocally that:

"According to the present invention, the serum or other biological product is transformed from the liquid to the completely frozen solid state by substantially instantaneous freezing of the liquid by indirect contact with a freezing agent such as liquid air, dry ice (solidified carbon dioxide) or other low temperature refrigerant or freezing mixture and by subliming the ice from the frozen mixture while preventing melting thereof, while maintaining a high vacuum, the frozen water being removed from the frozen material without melting or softening the material."

The patentee then goes on to say:

“The substantially instantaneous freezing of the serum or other liquid biologically active product is advantageously carried out by placing the liquid material in a container, such as a spherical glass flask or metal cylinder and then freezing the material quickly, solidly and completely on the inside of the container, preferably in the form of a thin layer on the inner surface of the container, by immersing the container in a freezing mixture at a temperature far below the freezing point of the material or by spraying the charged container with the cooling substance, using such cooling substances as liquid air, dry ice, or other freezing mixture at a temperature far below the freezing point of the material.

“In order to insure quick and substantially instantaneous and complete freezing it may be necessary or desirable to add the liquid material to the chamber or container by installments and to allow the material to freeze solidly in the form of layers on the inside of the chamber. When a layer of the material is thus frozen in a substantially instantaneous manner to a temperature far below the freezing point, the addition of a further amount of the material will result in its substantially instantaneous freezing by coming in contact with the already frozen layer of material at such a low temperature, and by the further cooling action of the liquid air or other refrigerant in contact with the outside of the container.”

The patentee then goes on to describe how the frozen serum, which again he states to have been frozen in a substantially instantaneous manner, is placed within a chamber or container which is connected with a high vacuum pump, how vacuum is employed to sublime the ice from

the serum, how the chamber may be warmed to increase the rate of evaporation, and how, when the frozen water has been completely or almost evaporated, the charged chamber and its contents take on the temperature of the surrounding atmosphere. Commencing on page 2, col. 1, line 53, of the patent, the patentee again refers to the instantaneous freezing, stating:

“As a result of this treatment of the serum or similar biological product there are avoided or prevented any apparent physical or biological changes in the substance which is instantaneously frozen and lyophilized while maintained in its frozen state, and as a result there is obtained a final product which has not been deteriorated by treatment in a liquid state while the water is being removed therefrom. By transforming the liquid substance quickly and completely into a frozen solid state, the component parts of the colloidal system are permanently fixed and changes are prevented in the chemical equilibrium such as would occur at the surface in the dehydration of a liquid product, and such as frequently results in the formation of polymers or anhydrides of the protein or other constituents. It is well known that when such surface films occur, in the evaporation of aqueous materials such as sera, they possess different properties from the rest of the proteins as is shown by their marked insolubility.”

After another general reference to the results of his process, the patentee again refers at page 2, col. 2, line 8, to his manner of freezing, stating:

“The rapid freezing of the serum or similar material and the removal of the frozen water from the frozen solid material leaves the organic residue of the

material in a porous and sponge-like condition, with the structure of the colloidal particles apparently unchanged.”

Thereafter, the patentee discusses at some length the properties of the product obtained by his process and their advantages, and then proceeds to describe apparatus for carrying out the process, noting at page 3, col. 1, line 29, of the patent that

“The refrigerant may be a freezing mixture such as dry ice, dry ice and acetone, liquid air, etc.”

(The Court will note that these substances are substances of extremely low temperature, the warmest being dry ice, which is normally at a temperature of approximately $-70^{\circ}\text{C}.$)

Following this, and commencing on page 3, col. 1, line 41, of the patent, the patentee states:

“In the carrying out of the process a small amount of the serum or other material may be placed in the container 1 and this container then immersed in liquid air or other refrigerant which will bring about rapid and substantially instantaneous freezing of the material and reduction of its temperature far below its freezing point. The addition of further amounts of the liquid material combined with further refrigeration will result in the forming of successive layers of rapidly frozen material until a proper charge of frozen material is contained therein. The material 2 is shown as forming a thick layer on the walls of the container such as results where successive amounts of liquid are added and the container rotated so that successive layers of the material are frozen. In a flask of 50 liters capacity the charge may be, for

example, thirty liters of material which is thus frozen to a solid state in the manner above described. In a flask of 20 inches diameter the layer of frozen material may be for example about 4 inches in thickness on the inside wall of the container.

“When the container has thus been charged with the frozen material, which is frozen to a temperature far below the normal freezing temperature, it is connected with the condenser and the air is exhausted and a high vacuum applied.”

Thereafter, the patentee describes the remainder of his process, stating that the material is maintained in a solid frozen state until the ice has been evaporated or sublimed therefrom, whereupon the container and its charge gradually take on the temperature of the surroundings until the substance attains a temperature substantially above 0°C. The patentee observes that this later has the important advantage of promoting the removal of residual water still present in the product after the ice has been sublimed therefrom, and giving a final product of improved stability, keeping properties and resistance to deterioration. Immediately after this, the patentee at page 3, col. 2, line 26, states:

“The rapid freezing of the serum or other material retains the structure of the colloid particles and constitutes and prevents change in concentration or degree of dispersion in water such as would occur in the evaporation of the materials in a liquid state. Apparently the rapid freezing of the liquid material results in a substantially complete and permanent fixing of the constituents, including colloidal constituents and inorganic salts, in the state and relative relations

in which they exist in the fresh liquid material, such that, when the resulting lyophilic products are subsequently treated with fresh water they reassume practically their original state and reproduce a serum or other liquid biological product having the same or practically the same physical and biological properties as the fresh material."

Thereafter, the patentee again discusses briefly the advantages of his process and proceeds to make his patent claims.

It will be noted by this Court, therefore, that the patentee, in addition to expressly limiting his claims to quickly or substantially instantaneously freezing, has in his statement of invention and in his description of his process referred to such freezing in unequivocal terms as consisting of an extremely important part of his process and invention, and indeed the important part thereof. While the patentee briefly refers to the taking on of a higher temperature by the freeze drying product at the end of the process in but two portions of his patent description, said description is replete with references to original instantaneous freezing, its advantages, its means of application, and its function. It is submitted that no fair reading of this patent document can lead to any conclusion but that the document purports to patent quickly or substantially instantaneous freezing as a necessary and essential step in the patented process, if not the essential step thereof, and it is submitted that in applying the doctrine of equivalents to hold that this patent is not a patent for quickly or instantaneously freezing but, on the contrary, is a patent covering a process including any kind of freez-

ing, this Court has committed serious error in view of the following legal principles covering patent construction and the effect of the patent grant.

As this Court recognizes in its opinion, no limitation which a patentee puts into his claims may be ignored and omission of a claim limitation by the alleged infringer will result in a holding of non-infringement. This is in consequence of the firmly established policy that a patentee will be limited to the precise terms of his grant that the public may know that which it may do and that which it may not do. *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 24 L. Ed. 344; *Fay v. Cordesman*, 109 U. S. 408, 27 L. Ed. 979; *McClain v. Ortmyer*, 141 U. S. 419, 35 L. Ed. 800.

Further in ascertaining those limits of the patent grant, it is well settled that recourse must necessarily be had to the entire patent document, that is, not merely to the claims but also to the description. Otherwise, the protection to the public which the patent as a definitive document affords would be lost. *Hogg v. Emerson*, 47 U. S. 437, 12 L. Ed. 505; *Greenawalt v. American Smelting & Refining Co.*, 10 F. 2d 98 (9 Cir.); *Haynes Stellite Co. v. Osage Metal Co., Inc.*, 110 F. 2d 11 (10 Cir.).

Of course, as this Court has recognized and as is pointed out in the decisions cited by this Court in its opinion, strict literal interpretation of restrictive claim language is not always adhered to and where possible, in order to afford the patentee the protection to which he is entitled, resort is had to the doctrine of equivalents. This, this Court has purported to do in the instant case, but it is submitted that in so doing, this Court has ignored the whole purport and

intent of the Reichel patent description, has disregarded the meaning of the Reichel patent as a contractual document, has lost sight of the public interest involved, and has, in fact, done precisely that which is condemned unequivocally in the *Keystone Bridge Co. v. Phoenix Iron Co.* and *Fay v. Cordesman* cases, *supra*.

While it is true that the doctrine of equivalents may be resorted to in the proper case, it is not true that the doctrine may be applied indiscriminately wherever a Court may feel that while the patentee has made a meritorious invention he has failed to patent it. It is submitted to be the law, on the contrary, that the principle of equivalents can only apply where the patent document as a whole provides a basis for and supports a claim of monopoly sufficient to cover the alleged equivalents.

Thus, as early as the case of *Snow v. Lakeshore and Michigan Southern Railway Co.*, 121 U. S. 617, 30 L. Ed. 1004, the Supreme Court, in considering the allowable scope of a patent claim, referred to the description of the patent, observed that there was nothing in the description indicative that the patentee contemplated any alternative other than the precise arrangement described, and held that, therefore, the claim must be restricted to precisely that which was shown in the description.

In *White, et al. v. Dunbar, et al.*, 119 U. S. 47, 30 L. Ed. 303, the Supreme Court in considering a reissue patent granted upon an application filed five years after issuance of the original patent held the reissue claims invalid, as broader than those of the original, because in the specifications of the original patent such limited and restrictive language was used as to provide no basis for

the broader claims of the reissue. Had a range of equivalents been permissible to the original claims, which would include the scope of the reissue claims, it is, of course, obvious that the reissue would not have constituted a broadening of the original patent.

Further, in *U. S. Industrial Chemicals, Inc. v. Carbide and Carbon Chemicals Corp.*, 315 U. S. 668, 86 L. Ed. 1105, the Supreme Court held a reissue patent invalid as failing to be for the same invention as was the original patent, merely because the claims of the original patent and the disclosure of the original patent, which set forth a process for mixing dry oxygen and water and steam and ethylene in the presence of a catalyst to produce ethylene oxide, would not support the reissue, the claims of which omitted the adding of water or steam. It was proven that the introduction of the water was not essential to the process, but the Court held that if this were so, it should have been set forth in the original patent. Here the Court did not even consider whether the step of adding dry oxygen was equivalent to the step of adding wet oxygen, *i. e.*, oxygen and water or steam, which the evidence showed produced the same result, and held the patentee to the restrictive terms of his original specification.

And in *Lakerwood Engineering Co. v. Stein*, 8 F. 2d 713 (6 Cir.), the Court of Appeals for the Sixth Circuit squarely held that since the description of the patent was restricted and provided no basis for a broadening of the claim by resort to the doctrine of equivalents, the patentee must be limited to the literal terms of his claim. The same rule was applied by the Court of Appeals for the Seventh

Circuit in *Staudé v. Bendix Products Corporation, et al.*, 110 F. 2d 484 (7 Cir.).

These cases and the cases cited above, which hold that the application of patent claims to alleged infringements must depend upon a construction of those claims in the light of the patent document as a whole, show clearly that no latitude will be allowed the patentee which is not consistent with his statement and description of his invention as it appears in the patent. Appellant has found no cases holding otherwise and those cases cited by this Court in its opinion and which purport to apply the doctrine of equivalents to relieve the patentee from the strict literal language of his claim terminology are entirely in accord with the foregoing principles.

Thus, in *Pedersen v. Dundon*, 220 Fed. 309 (9 Cir.), this Court stated that it would not refuse the patentee the doctrine of equivalents, but made special reference to the absence of any expressed intention by the patentee to limit his invention to a precise form. In *Claude Neon Lights v. E. Machlett & Son*, 36 F. 2d 574 (2 Cir.), Judge Hand, in holding the patentee strictly to the terms of his claims stated:

“Furthermore and quite independently, the disclosure emphasizes the necessity that the neon shall be pure, a requirement which pervades the whole, and was the basis of much of the argument by which he prevailed before, especially in distinguishing between spectral and commercial tubes. It is not disputed that in operation the caesium vaporizes, for the mirror, *qua* mirror, has no part in the circuit. The

defendant has here too abandoned the disclosure by the deliberate introduction of an 'impurity,' which in some curious way hangs about the cathode and does not infect the positive column at all." (P. 576.)

In *Otis Elevator Co. v. Atlantic Elevator Co., Inc.*, 47 F. 2d 545 (2 Cir.), before considering whether the defendant's device might fall within the allowable scope of equivalents of the patent claims, the Court stated:

"The specifications, however, did not declare that an auxiliary winding was essential to the invention." (P. 545.)

In *Keith v. Charles E. Hires Co.*, 116 F. 2d 46 (2 Cir.), there was no discussion of the scope of the disclosure of the patents involved.

This Court in its opinion lays much emphasis upon the fact that the novelty in the claims in issue is found in other steps of the claims, and that freezing as limited by the patentee did not constitute the essence of his invention. Whereas in the proper case this fact may often justify a more liberal application of the doctrine of equivalents, it is submitted that it in nowise removes the instant case from the scope of the principles set forth above. For example, the inventive contribution in *U. S. Industrial Chemicals, Inc. v. Carbide and Carbon Chemicals Corporation*, *supra*, lay in combining oxygen and ethylene in a heated reaction chamber in the presence of a catalyzer in order to produce the ethylene oxide. This, as it turned out later, was the essence of the invention, not the addition or omission of water. But regardless of this, the Supreme Court construed the original patent to be limited to the water addition step.

Considering the Reichel patent as a whole, as is required by the principles set forth above, it is obvious that the inclusion of quick or substantially instantaneous freezing was no accident, but rather defined the Reichel process as Reichel conceived it and as Reichel held the process up to the public in his patent document. Indeed, even the file wrapper, were it pertinent, is replete with the patentee's arguments to the effect that slow freezing, such as is used by appellant, and rapid freezing, such as is taught by Reichel, are entirely dissimilar things. As observed by this Court in its opinion, the statement in such file wrapper that the applicant considered himself entitled to a claim for continuing the application of the high vacuum until the material within the container reached a temperature substantially above $0^{\circ}\text{C}.$, irrespective of whether the material was initially frozen at $-20^{\circ}\text{C}.$ or $-70^{\circ}\text{C}.$, cannot be used to expand the scope of the Reichel claims. But even the file wrapper shows conclusively that the freezing limitations in claims 11, 12 and 13 were far from accidental. The limitation of quickly or substantially instantaneously freezing was in the claims from their introduction into the case. The limitation was in the claims at the time of the file wrapper statement above-referred to. It was in the claims when the patent was granted, was in the claims during the prosecution of the reissue patent, and remained in the claims when the patent in fact did reissue. *Philadelphia Rubber Works Co. v. Portage Rubber Co.*, 241 Fed. 108 (6 Cir.).

Since the public is entitled to the protection afforded by the definitive patent document, since the claims of the Reichel patent are expressly limited to quick or instan-

taneous freezing, and since this limitation is shown by the patent description to be intentional and restrictive, the patent may not be extended in scope to cover processes which do not respond to the limitation. While the doctrine of equivalents may be invoked to prevent a mere colorable evasion of the patent, where it appears from the patent description itself that the patentee has put the public on notice that his invention is of a certain scope, no justification exists for expanding the patent to cover that which it does not purport to cover. Merely because it may subsequently turn out that the patentee's real contribution has lurked some place in the claim other than in the step at which a competitor has departed from the patented process, the patent may not be something other than it purports on its face to be and may not cover something different than the patentee had agreed himself entitled to patent in his contract with the public. To hold otherwise is to ignore the patent as the definitive document circumscribing the patentee's rights and warning the public of what it may do and may not do.

In the instant case, as has hereinbefore been shown, any fair reading of the Reichel patent would lead the public to the conclusion that Reichel's patented process is one for freeze drying wherein the original freezing is quick or substantially instantaneous. Appellant was entitled to rely upon this plain showing in the patent, and should not be permitted to be trapped by an exercise of the doctrine of equivalents which extends appellees' monopoly not to what was patented but to that which turns out to be Reichel's principal contribution thirteen years after the grant of his original patent.

II.

Even if the Doctrine of Equivalents Could in This Case Operate to Ignore the Express Limitation of the Claims, the Existence of Such Equivalency Must Be Proven.

Appellant has shown how in accordance with well established principles of patent law, no scope can be afforded the Reichel patent which departs from the plain meaning and import of the patent document as such. But even were appellees entitled to invoke the doctrine of equivalents, its proper application to appellant's processes demands that the actual existence of equivalency be proven. Such proof is absolutely lacking in the instant case and, indeed, the evidence shows clearly that no equivalency in fact exists between appellant's slow freezing and the quick or instantaneous freezing of claims 11, 12 and 13 of the Reichel patent.

It is elementary law that the burden of proving infringement, if denied, is upon the party seeking to enforce its patent. *Fuller v. Yentzer*, 94 U. S. 299, 24 L. Ed. 107; *Bates v. Coe*, 98 U. S. 31, 25 L. Ed. 68; *Western Well Works v. Layne & Bowler Corporation*, 276 Fed. 465 (9 Cir.)

In this case the Court has held that appellant's processes are an infringement of claims 11, 12 and 13 of appellees' patent. To do this the Court has held that 79% of appellant's products were not frozen by quick or substantially instantaneous freezing as required by these patent claims

but nevertheless that appellant's slow freezing is the equivalent of the quick and instantaneous freezing of the patent. It is appellant's contention that such equivalency has not been proven and indeed that the record shows clearly the lack of such equivalency.

It is well settled that it is not sufficient to establish equivalency merely that the same general overall result is obtained through the process of the charged infringer as is obtained through the process of the patent. *U. S. Rubber Co. v. General Tire & Rubber Co.*, 128 F. 2d 104 (6 Cir.). If this were true, the first in the art to attain a result would foreclose all others from reaching the same result no matter what manner or means of attaining the result were used. On the contrary, the doctrine of equivalents insists that the particular element or step of the alleged infringer must perform the same or substantially the same function as the step or element to which it must respond in the patent and must perform this function in the same or substantially the same way. *Leishman v. Associated Wholesale Electric Co.*, 137 F. 2d 722 (9 Cir.).

III.

No Scintilla of Proof Exists That Appellant's Slow Freezing Either Accomplishes the Result of the Quick or Instantaneous Freezing of the Patent, or Accomplishes Said Result in the Same or Substantially the Same Way; on the Contrary, the Evidence Shows the Appellant's Slow Freezing Does Not Produce the Result Taught in the Reichel Patent.

Assuming, therefore, *arguendo* that appellees are entitled to invoke the doctrine of equivalents to expand the scope of their patent beyond its literal language, the question becomes, have appellees, as plaintiffs in the instant case, proven that appellant's slow freezing accomplishes the same or substantially the same result in the same or substantially the same way as does the quick or substantially instantaneous freezing of the patent? Appellant submits that they have not.

The function and mode of operation of quick or instantaneous freezing in the freeze drying process is discussed in this case in five places. It is discussed in the patent description itself; in the testimony of appellees' witness, Dr. Leake; in the testimony of the patentee himself, Reichel; in the testimony of appellant's witness, Dr. Hildebrand; and in the patent file wrapper.

As to the result, the patent states on page 2, column 1, lines 52 to 72:

"As a result of this treatment of the serum or similar biological product there are avoided or prevented any apparent physical or biological changes in the substance which is instantaneously frozen and lyophilized while maintained in its frozen state, and

as a result there is obtained a final product which has not been deteriorated by treatment in a liquid state while the water is being removed therefrom. By transforming the liquid substance quickly and completely into a frozen solid state, the component parts of the colloidal system are permanently fixed and changes are prevented in the chemical equilibrium such as would occur at the surface in the dehydration of a liquid product, and such as frequently results in the formation of polymers or anhydrides of the protein or other constituents. It is well known that when such surface films occur, in the evaporation of aqueous materials, such as sera, they possess different properties from the rest of the proteins as is shown by their marked insolubility.”

Thus, the patent teaches that the function of the instantaneous freezing step of the patented process is to transform the liquid substance quickly and completely into a frozen solid state, whereby to permanently fix the component parts of the colloidal system and prevent changes in the chemical equilibrium of the substance which frequently result in the formation of polymers or anhydrides of the protein or other constituents.

One may subject the record in this case to a fine-screening and yet find no evidence whatsoever that this is the function of appellant's slow freezing. While Dr. Leake, appellees' own witness, only had to say that he did not think instantaneous freezing was an essential feature of the Reichel process, a legally erroneous conclusion, Reichel, the patentee, testified that

“the reason for instantaneous or quick freezing of a biologically active substance is so that the water con-

tent will not be separated into large crystals which might rupture the biological cells or the other cells of the material." [R. 197.]

He further testified:

"Q. And if the ice crystals are minute then they do not interfere with the protein structure? A. When the ice crystals are small and obtained by freezing at this low temperature then the water can be sublimed from the material without damaging the biological activity of the material." [R. 197.]

and later he testified:

"If you remember our statements about large ice crystals and small ice crystals, where it is pointed out that small ice crystals are the desirable size. In order to obtain small ice crystals you have got to freeze instantaneously, in accordance with these specifications. If you do not you get large crystals and you do not freeze in accordance with the specifications." [R. 200.]

Dr. Reichel's testimony explaining the function and mode of operation of instantaneous freezing as producing the result specified in the patent specifications, is fully confirmed by the testimony of Dr. Hildebrand. Dr. Hildebrand testified:

"Q. Using those terms relatively, what occurs in a very low temperature or rapid freezing, and I mean by rapid freezing the rate of freezing? Just briefly tell us what is the rate of freezing and what could

occur at a very fast rate as compared with the very slow rate of freezing of a material? A. The more rapid the rate, other things being equal, the smaller will be the crystals, because you don't give time for the crystals already formed to grow bigger, but you start new crystals everywhere. That rate will be also influenced by the dissolved material. The size of the crystals will be influenced by the dissolved material also. . . .” [R. 287-288.]

And the file wrapper offers further evidence of what was meant to be accomplished by Reichel's step of rapid or instantaneous freezing. Reichel's affidavit of May 1, 1936, offered during the prosecution of his patent application states:

“1. The serum frozen at -20°C . appeared to have lamellae or fissures radiating from the center on the surface, and when cut longitudinally showed a fibrous structure. The fibres were loosely held together and offered little resistance to compression. The color of the material was slightly yellow. The material frozen at -74°C . had a smooth surface, with no fissures or lamellae, and was whitish-grey in color. In sections, the material was similar in appearance to that of the other products, except that the fibres were more compact and offered more resistance to compression. I am attaching hereto, marked Exhibit B, three comparative photo-micrographs showing the micro-structure of the two samples of material. In these photo-micrographs, the portions marked in ink (A) are of the material frozen at -20°C .,

and the portions marked in ink (B) are of the material frozen at -74°C . The magnification used in obtaining these pictures was 100 X. From these comparative pictures, it is clear that the material frozen at -74°C . has a much finer grain, with finer interstices, than the material frozen at -20°C . The reason for this is that the sample frozen at -20°C . was slowly frozen, with the formation of relatively large ice crystals, whereas the sample frozen at -74°C . was quickly frozen, with the formation of small ice crystals, and with the components of the serum uniformly distributed throughout the mass of the serum and with the colloidal equilibrium undisturbed. The freezing at drastically low temperatures, such as -74°C ., fixes the component parts of the serum and prevents denaturation and changes in the physical properties of the serum, due to separation and segregation of the water as large ice crystals." [R. 463-464.]

The face of the Reichel patent, therefore, and all the pertinent evidence in this case shows one thing, and one thing conclusively. The function of the quick or instantaneous freezing step in the Reichel process was not merely to get the substance frozen in the first instance, so that it could be subjected to the remainder of the Reichel process; it was to freeze the substance in such manner that large ice crystals would not be formed which might destroy the structure of the biological substance and thus injure its properties. Yet not one iota of evidence exists in the instant case either that appellant's slow

freezing accomplishes the result of the quick or instantaneous freezing of the patent, or even is desired to accomplish that result. And not one iota of evidence exists in the instant case that appellant's slow freezing produces those small ice crystals which accomplish this result. All that can be said for appellant's slow freezing is that it may be presumed to produce precisely those results objected to by Reichel and criticized in his affidavit [R. 463], and, further, that appellant's slow freezing is not the process of Reichel [R. 211].

It is, therefore, evident that even could the Reichel disclosure be considered to furnish a basis for a broadening of the Reichel claims beyond their literal language through resort to the doctrine of equivalents, the existence of equivalency between the Reichel quick or instantaneous freezing and appellant's slow freezing is nowhere shown in this record and, indeed is shown to be lacking by the positive evidence furnished by the patentee himself by deposition and through affidavit. It is therefore submitted that this Court's conclusion that appellant's freezing step is the equivalent of that of the patent is plainly erroneous.

IV.

The Holding of This Court That the Validity of Claims 4 and 5 of the Flosdorf, et al. Patent Lies in the Fact of Combination, Rather Than the Novelty of Any Particular Element, Still Compels the Conclusion That Said Claims Are Invalid as Failing to Claim the Combination and Instead Claim the Result or Function of Said Combination.

In its opinion sustaining the validity of the Flosdorf, et al. patent, this Court proceeds on the theory that the validity of claims 4 and 5 therein lies "in the fact of combination rather than the novelty of any particular element," stating that the invention was the combination of well-known types of pumps and ejectors with the well-known freeze drying process, this combination being founded on the patentees' discovery that it was possible to desiccate frozen biological material at a much lower degree of vacuum if the vapor were pumped out directly. In this the Court observes that appellant has misconstrued the nature of the invention, and that appellant has urged that the invention of the patent lay in new types of pumps.

It is submitted that such was not the contention of appellant but, on the contrary, it has been appellant's position that if Flosdorf, et al. invented a new combination of apparatus, their patent should have claimed this new combination rather than claim the result which this new combination effected.

The most liberal construction of the invention of Flosdorf, et al. cannot lead to the conclusion that their invention lay in the omission of the use in the freeze drying

process of desiccants or condensers. Such omission would have accomplished nothing whatsoever, other than to leave the water vapor free throughout the apparatus either to hinder the sublimation of ice from the subliming biological substance or to be drawn into the pumps then used. Yet this is the only language in claims 4 and 5 of the patent which in any way distinguishes the claimed process from that which had gone before.

Whether the patentees have discovered the feasibility of using lower vacuums if the water vapor be pumped out directly from the desiccating chamber, or not, the fact remains that the patentees' invention lay only in the discovery of means whereby the freeze drying process could be operated at this low vacuum, such means consisting in a combination with the old freeze drying apparatus of suitable pumps immune to vapor deterioration. Whether such pumps had to be designed by the patentees, or whether such pumps were old, is immaterial to the question here involved. Having invented the combination as this Court has held *Flosdorf, et al.* did, it was the patentees' duty to "particularly point out and distinctly claim the part, improvement, or combination" which they claimed as their invention or discovery [R. S. §4888, 35 U. S. C. §33]. This the patentees did not do. Instead, the patentees distinguished from the prior art only by a statement which completely forecloses further advancement in the art as regards any new and inventive combinations of apparatus which might avoid the admittedly undesirable use of chemical desiccants and condensers. It is appellant's position that this is precisely that which is condemned in the cases cited in appellant's briefs prior to the hearing in

this case, and that it is precisely this fact which renders this case controlled by the previous case in the Ninth Circuit, *United States Consol. Seeded Raisin Co. v. Selma Fruit Co.*, 195 Fed. 264 (9 Cir.).

As appellant has stated, the fact, if it be true, that the root of the Flosdorf, *et al.* invention was the discovery that it was possible to desiccate frozen biological material at a much lower degree of vacuum if the vapor were pumped out directly, makes no difference to the patentees' failure to claim their combination rather than a result of their combination. Indeed, if the patentees were entitled to claim their combination in terms of process, which appellant contends they were not, such process should have been claimed as including the step of pumping the water vapor out directly, since the Court has decided that it is this which permits the lower degree of vacuum. But if such lower vacuum does have pertinency to the validity of the Flosdorf, *et al.* patent, this Court will note that the statement of the patentees at page 1, col. 2, lines 31-36, of the patent that—

“In prior processes, it has been necessary to use very high vacuums, such as pressures of the order of 0.001 mm. (all pressures are given in millimeters of mercury), but we use pressures of a higher order, such as pressures up to $4\frac{1}{2}$ mm.”

is shown as erroneous by the record in this case. Appellant's Exhibit F-5 [R. 533] shows that Shackell set 3 mm. as the upper pressure limit for his freeze drying of biological substances [R. 542]. Appellant's Exhibit F-7 [R. 544] shows that Hammer used a pressure of 18 mm. to freeze dry biological substances [R. 546], and Appel-

lant's Exhibit F-10 shows that Karsner and Collins taught a pressure of 15-40 mm. in experimenting with Shackell's process [R. 576]. Shackell, Hammer, and Karsner and Collins all used chemical desiccants. It cannot, therefore, be accurately said that the Flosdorf, *et al.* invention rests upon the discovery that higher pressures are permissible because of pumping the water vapor directly from the freeze drying chamber. Such higher pressures were used long prior to Flosdorf, *et al.* by workers in the art who did not dispense with chemical desiccants. The simple fact is that Flosdorf, *et al.* conceived the idea of using a combination of the pumps disclosed in their patent with freeze drying apparatus and were thus able to avoid having to use chemical desiccants and condensers, the disadvantages of which are set out in their patent. Having by their new combination achieved this ability to do without the said chemical desiccants and condensers, the patentees were not content to claim their new combination as required by the statute, but rather claimed the very result which they had attained. It is submitted that such claiming is contrary to the law and that claims 4 and 5 of the Flosdorf, *et al.* patent are therefore invalid.

Petitioner therefore respectfully requests it be granted a rehearing on these points.

Dated at Los Angeles, California, this 25th day of January, 1950.

Respectfully submitted,

LYON & LYON,

By LEONARD S. LYON,
LEONARD S. LYON, JR.,
RICHARD E. LYON,

Attorneys for Petitioner.

Certificate of Counsel.

I believe that the petition for rehearing is well founded, and I certify that it is not filed for purposes of delay.

Dated at Los Angeles, California, this 25th day of January, 1950.

LEONARD S. LYON,

Attorney for Petitioner.



No. 12102

United States
Court of Appeals
for the Ninth Circuit

JOE BALESTRIERI AND COMPANY,
Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

FILED

FEB - 1 1949

No. 12102

United States
Court of Appeals
for the Ninth Circuit

JOE BALESTRIERI AND COMPANY,
Petitioner.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Petitioner:

JOHN L. FLYNN,
LOUIS JANIN,
HAROLD E. HAVEN,
DUDLEY F. MILLER.

For Respondent:

A. W. NYQUIST.

Docket No. 12834

JOE BALESTRIERI AND COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1947

Jan. 6—Petition received and filed. Taxpayer notified. Fee paid.

Jan. 7—Copy of petition served on General Counsel.

Feb. 20—Motion to dismiss the proceedings for failure properly to prosecute filed by General Counsel.

Feb. 24—Hearing set March 26, 1947, Washington, D. C. on respondent's motion.

Mar. 21—Motion for leave to file the attached amended petition (verification) filed by taxpayer. 3/21/47 Granted.

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Mar. 21—Order that the respondent's motion to dismiss is denied and this proceeding is stricken from the calendar for March 26, 1947 entered.

Mar. 24—Copy of motion to amend and order served on General Counsel.

Apr. 15—Answer filed by General Counsel.

Apr. 15—Request for hearing in San Francisco filed by General Counsel.

Apr. 18—Notice issued placing proceeding on San Francisco calendar. Service of answer and request made.

Aug. 22—Hearing set Nov. 3, 1947, San Francisco.

Nov. 3—Hearing had before Judge Tyson on petitioner's motion to continue, agreed to by respondent. Motion granted. Continued to next calendar. Affidavit and motion for continuance filed at hearing. Copy served.

1948

Jan. 26—Hearing set March 22, 1948, San Francisco.

Mar. 25—Hearing had before Judge Kern on merits. Petitioner's motion to substitute counsel granted. Petitioner granted 15 days leave to amend petition. Respondent granted 15 days to file answer. Motion to substitute counsel, motion to file amendment to answer and answer, amended petition and notices of appearance of Louis Janin, Harold E. Haven and Dudley F. Miller as counsel filed at

1948

hearing. Briefs due May 19, 1948; replies June 14, 1948.

Apr. 19—Motion to file answer to amended petition, answer to amended petition lodged, filed by respondent.

Apr. 21—Above motion to answer to amended petition granted, answer filed.

Apr. 21—Transcript of hearing 3/25/48 filed.

Apr. 21—Transcript of hearing 3/26/48 filed.

May 19—Brief filed by taxpayer. 5/21/48 Copy served.

May 20—Brief filed by General Counsel.

June 14—Reply brief filed by General Counsel. Served 6/15/48.

June 14—Reply brief filed by taxpayer. 6/15/48 Copy served. [1 *]

Aug. 2—Memorandum findings of fact and opinion rendered, Judge Kern. Decision will be entered for the respondent. 8/3/48 Copy served.

Aug. 3 —Decision entered, Judge LeMire, Div. 5.

Aug. 30—Motion to correct and enlarge findings of fact and opinion filed by taxpayer. 9/7/48 Denied.

Aug. 30—Motion to vacate decision filed by taxpayer. 9/7/48 Denied.

Aug. 30—Motion for reconsideration filed by taxpayer 9/7/48 Denied.

Aug. 30—Alternative motion for rehearing filed by taxpayer. 9/7/48 Denied.

* Page numbering appearing at foot of page of original certified Transcript of Record.

1948

Nov. 1—Petition for review by U. S. Court of Appeals for the Ninth Circuit with assignments of error filed by taxpayer.

Nov. 2—Proof of service filed.

Nov. 5—Designation of record filed by taxpayer with acceptance of service 11/17/48 thereon. [2]

The Tax Court of the United States.

Docket No. 12834

JOE BALESTRIERI & CO.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

AMENDED PETITION

Pursuant to leave of the Court first had and obtained to file an amended petition conforming to proof, the above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency. Bureau Symbols IRA:90-D-RR (C:TS:PD:SF:EDR) dated October 8, 1946, and as the basis of its proceedings, alleges as follows:

1. The petitioner is a corporation with its office formerly located at 432 Clay Street, San Francisco, California, but now located at 123 Jackson Street, San Francisco. The return for the period involved was filed with the Collector for the First District of California.

2. The notice of deficiency, a copy of which, together with page 5 of the statement annexed thereto, is attached [27] hereto and marked Exhibit A, was mailed to petitioner on October 8, 1946.

3. The taxes in controversy are excess profits taxes for the year ending December 31, 1943, the deficiency asserted therefor being \$25,021.70, and the amount in issue being approximately \$20,000.00.

4. The determination of the tax set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in denying the loss of \$22,229.37, or any part thereof, resulting from a business venture between the petitioner and Strategic Mineral Exploration Co., a partnership.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Petitioner is a corporation, incorporated February 15, 1941, under the laws of the State of California, and operates a wholesale fish business.

(b) At all times material, Joe Balestrieri and W. E. Otto were directors and the sole shareholders of petitioner. W. E. Otto was vice-president and Joe Balestrieri was president.

(c) In July of 1943, the partnership under the name of Strategic Mineral Exploration Co. was formed by and between Joe Balestrieri, W. E. Otto and J. M. Hoff, a mining engineer, for the purpose of carrying on a mining [28] and milling business with respect to chrome ore. On July 29, 1943, the partners filed a certificate of doing business under

a fictitious name with the County Clerk of the City and County of San Francisco, State of California. Said partnership attempted to obtain financing for this venture from Pacific Vegetable Oil Corporation, a concern with which petitioner had many business dealings. Pacific Vegetable Oil Corporation agreed to participate in the milling end of the venture but only if a guarantee against loss were obtained by the partnership from petitioner corporation.

(d) Petitioner corporation on July 26, 1943, in exchange for 50% of the profits from the milling venture agreed with Strategic Mineral Exploration Co. to bear any losses which might be sustained by such venture.

(e) Contrary to expectations, the venture proved unsuccessful and resulted in a loss of \$22,229.37, at the time of its termination in November, 1943. The other activities of Strategic Mineral Exploration Co. were terminated at the same time and the total loss then determined for all of the activities of said partnership was then believed to be some \$34,000; however, several thousand dollars of additional obligations were subsequently discovered and paid.

(f) In November of 1943 petitioner issued its promissory note to Pacific Vegetable Oil Corporation for the [29] amount of \$22,229.37, which amount the latter corporation had advanced to Strategic Mineral Exploration Co. in connection with its milling venture with petitioner, and which was lost in the operations of said venture.

(g) Petitioner entered into said venture with the expectation of realizing very substantial profits therefrom, Mr. Hoff, mining engineer, representing that a minimum profit of \$50,000 per month could be expected, and the officers and directors of petitioner felt that the agreement between it and Strategic Mineral Exploration Co. was exceedingly favorable to petitioner.

(h) Petitioner is informed and believes, and therefore alleges the fact to be that under the foregoing circumstances it is entitled to deduct the full amount of its share of the loss of the joint venture between itself and Strategic Mineral Exploration Co., to wit, the whole thereof, or \$22,229.37.

Wherefore, Petitioner prays that this Court hear the proceeding and determine that petitioner is entitled to the said loss of \$22,229.37, and redetermine the deficiency in accordance therewith, and for such other and further relief as may be meet and proper under the circumstances.

Dated March 29, 1948.

JOE BALESTRIERI & CO.,

By /s/ JOE BALESTRIERI,

President.

[30]

/s/ LOUIS JANIN,

/s/ HAROLD E. HAVEN,

/s/ DUDLEY F. MILLER,

Counsel for Petitioner.

State of California,
City and County of San Francisco—ss.

Joe Balestrieri, being first duly sworn, deposes and says:

That he is president of the petitioner above named, and as such is authorized to verify the foregoing petition; that he has read the same and is familiar with the statements therein contained, and that the same is true of his own knowledge except as to the matters therein stated upon information and belief, and as to those matters that he believes it to be true.

/s/ JOE BALESTRIERI.

Subscribed and sworn to before me this 29th day of March, 1948.

(Seal)

ALFRED D. MARTIN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: T.C.U.S. Filed March 29, 1948. [31]

[Title of Tax Court and Cause.]

ANSWER TO AMENDED PETITION

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the amended petition in the above proceeding, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the amended petition.

3. Admits the allegations contained in paragraph 3 of the amended petition except that respondent alleges that the deficiency asserted is in the amount of \$25,021.71.

4. Denies the allegations of error contained in paragraph 4 of the amended petition and in subparagraph (a) thereunder.

5 (a) and (b). Admits the allegations contained in paragraph 5(a) and 5(b) of the amended petition. [37]

(c) Admits the allegations contained in the first three sentences of paragraph 5(c) of the amended petition; denies the remaining allegations contained in said paragraph.

(d) and (e) Denies the allegations contained in paragraph 5(d) and 5(e) of the amended petition.

(f) Admits that in November of 1943 petitioner issued its promissory note to Pacific Vegetable Oil Corporation for the amount of \$22,229.37, which amount the latter corporation had advanced to Strategic Mineral Exploration Co. in connection with its milling venture with petitioner; denies the remaining allegations contained in paragraph 5(f) of the amended petition.

(g) and (h) Denies the allegations contained in paragraph 5(g) and 5(h) of the amended petition.

6. Denies generally and specifically each and every allegation in the amended petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Coun-
sel for Respondent.

Of Counsel:

B. H. NEBLETT,
Division Counsel,
T. M. MATHER,
C. W. NYQUIST,
Special Attorneys,
Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed April 21, 1948. [38]

Before the Tax Court of the United States.

Docket No. 12834

In the Matter of: JOE BALESTRIERI & COM-
PANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Court Room, U. S. Appraisers Building,
630 Sansome Street, San Francisco, Calif.

March 25, 1948—12:05 p.m.

(Met pursuant to notice.)

Before: Honorable J. W. Kern, Judge.

Appearances: Louis Janin, Esq., 1104 Mills
Tower, San Francisco, California, appearing on

behalf of Joe Balestrieri & Company, Petitioner. C. W. Nyquist, Esq., (Honorable Charles Oliphant, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of the Commissioner of Internal Revenue, Respondent. [41]

PROCEEDINGS

Mr. Haven: Is the Balestrieri case on your calendar?

The Court: Yes, sir, at two o'clock.

Mr. Haven: Could I refer to that for a minute? We have just been substituted in the case and I have a motion of substitution here. It is a peculiar situation.

The Court: You have been asked to substitute as counsel for taxpayer in the Balestrieri case?

Mr. Haven: Yes, your Honor. I am speaking of it now, because it may affect time. The party who signed the petition in this case, as I understand it, was not admitted to the Tax Court, an attorney, J. L. Flynn. He was supposed to try it and applied for admission to the Tax Court, and has not been admitted. William Acton, the Deputy in the District Attorney's office and friend of mine of long standing, called me yesterday afternoon and asked me if I could stand by, and I told him I was engaged in the trial this morning, that he would have to talk to my partner, Mr. Janin. The result has been that this morning they called up and asked us to appear in the case because they had no party of record in it, no party admitted to practice in the Tax Court to appear for them.

Mr. Acton is General Counsel of the Petitioner. He didn't discover, according to his statement to me, that he was not going to be represented in the Tax Court by proper counsel until just as he called me, about two o'clock yesterday, and of [42] course we would like to have the matter go over to the next calendar.

The Court: Under the circumstances, I would—

Mr. Haven: But Mr. Janin who is working on the case now would at least like to have the balance of the day.

The Court: I am sorry, I don't see how I could do anything other than call it just in order, because such a thing is inexcusable. I realize that your office had nothing to do with it, Mr. Haven, but we will have to go ahead with it just as soon as we get to it.

Mr. Haven: One fact further I might state: I think that Mr. Fabian Brown answered the calling of the calendar, didn't he?

The Court: The only person I know that answered was a man named Flynn.

The Clerk: Mr. Flynn answered the call.

Mr. Haven: Fabian Brown was the one who was supposed to try it, and they just discovered yesterday he wasn't admitted to the Court.

The Court: I think that I can't do anything on that, Mr. Haven, except stay right directly with it, and your office will just have to do the best they can with it.

Mr. Haven: I am sorry for Mr. Janin. I was fortunate. I had at least a day or two to get ready when I found I had to try a case. [43]

May I at least file these with the Clerk?

The Court: The motion for substitution or for the entries of appearance?

Mr. Haven: Both the motion to substitute counsel and note of appearance. I don't ask you to act on them now.

The Court: They will be filed.

(Whereupon, at 12:10 p.m., a recess was taken until 5:30 p.m. of the same day.) [44]

Afternoon Session—5:30 p.m.

The Court: I will now call the case of Joe Balestrieri & Company.

Will counsel state their appearances for the record, Joe Balestrieri & Company, 12834.

Mr. Janin: Louis Janin, appearing for the Petitioner.

Mr. Nyquist: C. W. Nyquist for Respondent.

The Court: May I have a statement as to the issues?

Opening Statement on Behalf of the
Petitioner

By Mr. Janin:

Mr. Janin: If your Honor please, I think the issue involved can be rather simply stated, reduced to its essentials.

In 1943, in July of 1943, the two shareholders who are interested in the petitioner corporation formed a partnership with a third man who is a mining engineer. They expected that this partnership would be a very successful operation. Funds were required to start off their venture, and they were without the means with which to finance it.

The corporation at that time was prospering, and they were told by a creditor, with respect to the source of funds, that they could obtain credit for their operation if the losses were guaranteed by the corporation.

They thereupon, that is, the partnership thereupon entered into an agreement with the corporation whereby in exchange for a 50 percent interest in the profits of the venture, [45] the corporation would assume all losses. I might say that there were two ventures in reality involved. One was a mining venture and one was a milling venture. It was only with respect to the milling venture that the corporation taxpayer participated with the partnership. In other words, we have two entities, a corporation and a partnership, and a third entity or semi-entity, a joint venture between the other two entities.

The venture was not as successful as had been anticipated, and as the picture had been painted by the mining engineer, and consequently, instead of the large profit that had been expected a large loss was sustained in rather short order. The share of the loss of the corporation was some \$22,000, which is the one item that is involved in this proceeding.

In November of 1943 the venture was terminated, the partnership ceased its operations, and on the tax return for that year the corporation claimed the loss of \$22,000.

The Court: That loss of \$22,000 is the only item which is in dispute?

Mr. Janin: That is the only item which is in dispute in this proceeding.

The Court: Mr. Nyquist.

Opening Statement on Behalf of the Respondent
By Mr. Nyquist:

Mr. Nyquist: The Respondent's position in this matter [46] is that the agreement on the part of the petitioner corporation was not an agreement to insure the partners against loss. It was merely a guarantee to the creditor who loaned money to the partnership that that creditor would not suffer loss upon the credit that he extended.

The petitioner corporation entered into the arrangement for the convenience and benefit of its two stockholders, and the loss to the extent that the corporation may have sustained the loss constitutes an item for which it is reimbursable by the stockholders. It is merely a contract of guarantee.

The corporation voluntarily paid the creditor. There is no showing that demand has ever been made upon the individual partners by the creditor for payment or any default by the partners on the payment to the creditor; that the corporation petitioner herein voluntarily assumed the obligation, and under California law, assuming, as the Respondent contends, that the contract was merely one of guarantee, the corporation has a valid claim against the individual partners. Therefore, the corporation suffered no deductible loss since there has been no showing it was unable to collect from the partners.

Furthermore, even assuming, as the petitioner contends, that the contract was not entered into

for the protection of the creditor, but was a guarantee which was entered into that the corporation would insure the partnership against loss, the contract was not entered into for a business purpose by the [47] corporation, the amounts paid thereunder do not constitute ordinary or necessary business expenses and do not constitute expenses in a transaction entered into for profit, and that this payment—by the way, Respondent does not concede that payment was made in the taxable year by the corporation, although I understand that payment was made in a subsequent year and a note given in the taxable year—am I correct in that?

Mr. Janin: Yes, a note was given in the taxable year and payments were made on it. I imagine there were some small payments made in the taxable year, but not of any great importance.

Mr. Nyquist: Respondent contends that whatever payments the corporation may have made here in effect constituted a dividend to the corporation's two stockholders, Mr. Balestrieri and Mr. Otto.

The Court: From counsel's statement it would seem to be an interesting question, but practically one of law. I shouldn't think there would be much difference between the parties with regard to the facts.

I see in the petition that it is alleged there was a resolution of the Directors of the taxpayer corporation covering this guarantee. I assume that that is available, and the contract itself, is that in writing?

Mr. Janin: That was in the form of an offer and an acceptance. [48]

The Court: In writing?

Mr. Janin: It is in writing, yes, your Honor.

The Court: I also understand, however, that counsel for petitioner was called in at the last minute in this case, but I am wondering if the documents in this case with which you probably are familiar, Mr. Nyquist, couldn't be gotten into the record by stipulation?

Mr. Nyquist: Yes. I have indicated to counsel for the petitioner that I would be glad to stipulate to that letter and to the merits of the Director's meeting. There was a letter from the partnership to the corporation making an offer, and the minutes of a Director's meeting authorizing the acceptance of that offer. Subject to petitioner's copy reading the same as my copy, I would be glad to stipulate to that.

The Court: I also suppose that the terms of the note are in evidence. You have a copy of the note that was given in payment?

Mr. Janin: I do not have a copy of the note. That is not in the possession of the taxpayer corporation, and the creditor corporation cannot, or at least the officers of the creditor corporation have not been able to locate the note, although request has been made for it.

Mr. Nyquist: Has the note been paid?

Mr. Janin: I believe it has been paid in full.

The situation is this: As far as the books of the [49] taxpayer are concerned, there have been other

note obligations to the same creditor. A general account was set up on the books of the taxpayer corporation, and no credits appear with respect to this particular note. So that it still stands on the books in its original amount, though I understand at the other end of the transaction it has been treated as having been fully paid. I don't think that the fact of payment is material in the proceeding.

The Court: Let's go ahead as much as we can then, gentlemen.

Mr. Nyquist, if I interrupted you, I am sorry. Did you have anything else that you wanted to say?

Mr. Nyquist: I might say that the Respondent has not conceded the amount of the loss sustained by the partnership. I don't know to what extent that is material to your case as you wish to present it. I presume if you had been in on the case earlier you probably would have been in with the books and we would have had that stipulated.

Mr. Janin: That, of course, is correct. Again, I don't think that the larger loss sustained by the partnership itself is really material to the proceeding. I do not have the books of the partnership available in the courtroom, and I understand that there is considerable doubt as to whether they are in existence.

The Court: Let's go ahead as far as we can, if you [50] have finished, Mr. Nyquist.

Mr. Nyquist: Yes sir, I have finished.

Mr. Janin: May I suggest that we start off by introducing in evidence the documents as to which there is no dispute? I think that will speed the proceeding.

Mr. Nyquist: I agree to that.

Mr. Janin: I will introduce in evidence as Petitioner's Exhibit 1 a letter from Strategic Mineral Exploration Company to Joe Balestrieri, dated July 24, 1943.

The Court: Admitted in evidence.

The Clerk: Exhibit 1.

(The letter referred to was marked and received in evidence as Petitioner's Exhibit No. 1.)

Mr. Nyquist: How about the minutes? That should be next.

Mr. Janin: I will offer in evidence as Petitioner's Exhibit 2, Minutes of a Special Meeting of the Board of Directors of Petitioner Corporation, July 26, 1943.

Mr. Nyquist: No objection.

The Court: Accepted in evidence.

The Clerk: Exhibit 2.

(The Minutes referred to were marked and received in evidence as Petitioner's Exhibit No. 2.)

Mr. Janin: I will offer in evidence a letter of the petitioner corporation to Strategic Mineral Exploration Company, [51] dated July 26, 1943, accepting the offer of Strategic Mineral Exploration Company.

Mr. Nyquist: No objection.

The Clerk: Exhibit 3.

The Court: Accepted in evidence.

(The letter referred to was marked and received in evidence as Petitioner's Exhibit No. 3.)

The Court: I understand not only is there no objection, but that Respondent admits that these documents are what they purport to be.

Mr. Janin: Yes. These are true and correct copies.

Mr. Nyquist: Respondent admits these are true and correct copies of the original documents. There may be some inconsistency within the document that might require some explaining, perhaps; but these are true and correct copies of the original documents.

The Court: All right.

Mr. Janin: I will offer into evidence a copy of the Articles of the co-partnership, dated July 1, 1943, between John M. Hoff, Joe Balestrieri and W. E. Otto; and also as a part of the same exhibit, a certificate of co-partners transacting business under fictitious name, bearing the same date.

The Court: Accepted.

Mr. Nyquist: I will agree to that, provided it be stipulated that that certificate was filed with the County Clerk [52] for the City and County of San Francisco on the 29th of July, 1943, that document.

Mr. Janin: That the certificate was filed with the County Clerk?

Mr. Nyquist: Yes, the certificate of co-partners doing business under a fictitious name was filed on July 29, 1943.

Mr. Janin: I don't know the facts on that, your Honor. but I think that counsel's statement probably correctly represents them.

The Court: All right, it will be admitted in evidence.

The Clerk: Exhibit 4.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 4.)

[Printer's Note]: Petitioner's Exhibit No. 4 is set out in full at page 54 of this printed Record.

Mr. Janin: I will ask Mr. Otto to take the stand at this time.

The Court: Gentlemen, I think we have probably gone as far as we can this evening. I wanted to get in as much as possible, the opening statements and undisputed documents.

Mr. Nyquist: We might put the tax returns in, sir, if you like.

The Court: All right, let's do that.

Mr. Janin: No objection at all.

Mr. Nyquist: As Exhibit A, the corporation income declared value excess profits tax return for the year 1943. [53]

The Court: Accepted in evidence.

The Clerk: Exhibit A.

(The income tax return referred to was marked and received in evidence as Respondent's Exhibit A.)

[Printer's Note]: Respondent's Exhibit A is set out in full at page 58 of this printed Record.

Mr. Nyquist: As Exhibit B, the petitioner corporation's Excess Profits Tax Return for the calendar year 1943.

The Court: Accepted in evidence.

The Clerk: Exhibit B.

(The income tax return referred to was marked and received in evidence as Respondent's Exhibit B.)

[Printer's Note]: Respondent's Exhibit B is set out in full at page 65 of this printed Record.

Mr. Nyquist: Respondent requests the usual leave to withdraw and substitute.

The Court: Leave granted.

How many witnesses will you have, Mr. Janin?

Mr. Janin: I think only two, your Honor.

The Court: I wonder if counsel could come at 9:30 tomorrow morning?

Mr. Janin: That is entirely convenient to me if it is with Mr. Nyquist.

The Court: As you see, I am running behind my schedule here, so I think we will recess this case until tomorrow morning at 9:30.

Mr. Nyquist: May I ask whether it is your Honor's intention to hear the Jamvold case before the Granberg case?

The Court: Yes, I will hear this case at 9:30 until [54] we finish. Then I will begin the Jamvold case, which is scheduled to last about two hours, I think.

Mr. Nyquist: Two to three. I imagine that will take until about lunch time, your Honor.

The Court: Then we get into the Grenberg case. All right, we will recess until 9:30.

(Whereupon, at 5:50 p.m., a recess was taken until 9:30 a.m., Friday, March 26, 1948.) [55]

March 26, 1948—9:30 a.m.

The Court: All right, gentlemen.

Mr. Nyquist: May it please the Court, I have just agreed with petitioner's counsel to save calling one witness by stipulating that Mr. Rocca who is the head of the Pacific Vegetable Oil Corporation, would not have made the loan or extended the credit which is under consideration in this case on the individual credit of Mr. Otto and Mr. Balestrieri, but he extended the credit only because he was protected by this guarantee from the petitioner corporation.

Mr. Janin: That is entirely correct, your Honor.

The Court: All right, it will be so stipulated.

Mr. Janin: Mr. Otto, will you take the stand, please?

Whereupon,

WALTER E. OTTO,

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

(Testimony of Walter E. Otto.)

Direct Examination

The Clerk: Please be seated and state your name and address.

The Witness: Walter E. Otto, 90 Ramona Ave., Piedmont, California.

By Mr. Janin:

Q. In 1943 what was your connection with the Petitioner [59] corporation, Mr. Otto?

A. I was vice president, not active in the management, but vice president.

Q. Were you also a shareholder of the corporation?

A. Yes, sir, I owned fifty percent of the stock at that time.

Q. What was your relationship to Strategic Mineral Exploration Company?

A. I was a one-third partner in that operation.

Q. Will you explain how that partnership came to be formed?

A. J. M. Hoff, a mining engineer, brought the project in to my office. It consisted of some mining claims and a chrome mill at Dunsmuir, California. He outlined we'd make a minimum of \$50,000 a month if we could provide the capital required to operate the mill.

Q. What did you do—I think we have that covered by stipulation.

What was your own financial condition at that time?

A. Well, outside of the assets I had in the fish company I had practically nothing in the way of liquid cash.

(Testimony of Walter E. Otto.)

Q. Outside of liquid cash what was your financial position?

A. I had no personal strength at all at that time outside of the fish company. interest in the fish company. [60]

Mr. Nyquist: By "fish company" you mean the Balestrieri Corporation?

The Witness: Joe Balestrieri and Company, yes.
By Mr. Janin:

Q. In order to obtain financing for this venture, you approached Pacific Vegetable Oil Corporation?

A. Yes.

Q. You asked them to advance credit?

A. I explained to Pacific Vegetable Oil the proposition. He said, "Reduce it to writing and I will consider it."

I did submit it to him, myself, on behalf of the partnership, and his reply after that was that he would go along with the deal, provided that we'd have the meeting of the Board of Directors of the fish corporation agree to underwrite, or absorb, any loss that might occur. We never thought there could possibly be any loss, we thought it was a bonanza in our lap rather than possible loss.

Q. Referring to Petitioner's Exhibit 1, will you please read the second paragraph of that letter?

A. (Reading document.)

I have.

Q. What was the understanding of the parties with respect to the language used in that letter as follows:

(Testimony of Walter E. Otto.)

“The consideration for this offer is that your corporation agrees to guarantee the payment for any losses or [61] deficits that may occur on the money borrowed from Pacific Vegetable Oil Corporation on our chrome milling venture.”

Mr. Nyquist: Objection, your Honor. The language of the document in itself is clear, and it calls for no parol evidence by way of explanation.

The Court: I will take under advisement the objection. If your premises are correct your conclusion is correct. But I will not at this time be able to give a definitive ruling on whether or not the language is so unambiguous as to not require parol evidence to explain it. That I will not be able to until I give greater study to it, so I will take under advisement your objection.

Mr. Janin: I think, if your Honor please, that the whole nub of the controversy is in the interpretation to be accorded that language, and that there is some real ambiguity in it.

The Court: It is your contention that the mere fact that you and Mr. Nyquist are not able to agree on it means it must be ambiguous.

All right, go ahead.

A. Well, Mr. Rocca realized that there was no individual in the partnership that could stand behind the money to be advanced.

Mr. Janin: That is not responsive to the question.

Would you read the question? [62]

(The question was read by the Reporter.)

(Testimony of Walter E. Otto.)

By Mr. Janin:

Q. Now, the parties are Strategic Mineral Exploration Company and the petitioner corporation, and they are the only parties involved in this communication.

A. We offered Joe Balestrieri, the partnership offered Joe Balestrieri and Company one-half participation in the earnings of that venture, which we thought was very liberal, and in exchange for that they were to guarantee us for any losses that might occur on the venture.

Q. What do you mean by the word "guarantee"?

A. Well, if we ran into difficulties and ran into a loss, they would absorb any loss that might occur.

Q. When you refer to the venture, what venture do you mean? Do you mean the operations of the partnership?

A. Of the partnership. The partnership had two features to it. One was the chrome mill and the other was mining.

Our money obtained from Pacific Vegetable Oil was strictly for the milling venture, and that is why it was \$22,000, and the balance was on the other end of the venture. We lost.

Q. In other words, the agreements of the petitioner corporation related only to the milling venture?

A. That was the reimbursement, that's right.

Mr. Nyquist: May I ask you to be a little careful [63] in leading questions.

(Testimony of Walter E. Otto.)

By Mr. Janin:

Q. What is your explanation for substantially the same language which appears in Petitioner's Exhibit 3 in the reply of the petitioner corporation to the partnership?

A. What was the question again, please? I was reading.

Q. What was your explanation of substantially the same language which appears in the reply?

A. This is Joe Balestrieri and Company's acceptance of the partnership's offer to them.

Q. That is correct, but what is your explanation of the language there? I refer particularly to—

A. That they accepted the proposal, and in consideration of the 50 percent participation that they would have in the profit, that they would absorb any losses that might occur.

Q. I will hand you Petitioner's Exhibit 2, which is the minutes of the meeting of the Board of Directors of the petitioner corporation, on July 26, 1943. In the minutes of said meeting, reference is made to a participation in one-fourth of the earnings of the chrome milling venture. Can you give any explanation why in the two prior exhibits, that is, Exhibits 1 and 3, reference is made to one-half, and in this exhibit reference is made to one-fourth?

A. That is strictly a typographical error. That was given to the secretary to draw up with the letters, and it was [64] read in there. How that

(Testimony of Walter E. Otto.)

occurred I cannot explain. It did, and we can't change the record.

Q. What was the understanding of the parties with respect to the participation?

A. One-half.

Q. Have you the books here of Strategic Mineral Exploration Company? A. No, sir.

Q. Why aren't those books in the court room?

A. Well, I only heard of this yesterday, day before yesterday lunch time, and then I had to, with Mr. Balestrieri, obtain counsel. Then, the books have been in a flux. The Strategic Mineral was a failure, and we set up our loss and we had outside accountants go over that and do it, because there were various interested parties. I looked for those books, but so far I couldn't put my fingers on them, but they are somewhere. I don't know where.

Q. You don't know where they are?

A. I haven't been able to put my fingers on them.

Q. As a matter of fact, we both looked for them last night, didn't we?

A. You might ask Mr. Balestrieri if those books were located.

Did you find the Strategic Mineral books?

Mr. Balestrieri: Here it is. [65]

By Mr. Janin:

Q. Mr. Otto, I show you an account—

Mr. Nyquist: Objection. May we have the books identified first?

(Testimony of Walter E. Otto.)

The Court: The Clerk unfortunately is not here right now. Could we go ahead with the questions?

Mr. Nyquist: I just want the witness to at least testify these were the books.

By Mr. Janin:

Q. Is this the general ledger of Strategic Mineral Exploration Company? A. Yes, sir.

Q. I show you an account in this book entitled, "Pacific Vegetable Oil Company," and ask you what that account represents.

A. That was the amount of money that was due the Pacific Vegetable Oil Corporation and which was paid, which had to be absorbed by Joe Balestrieri and Company.

Mr. Nyquist: I move that the last part of the answer be stricken as not responsive to the question and a conclusion and opinion of the witness.

The Court: I will have to ask the Reporter to read the answer to me.

(The answer was read by the Reporter.)

The Court: Objection overruled. [66]

By Mr. Janin:

Q. What is the closing balance shown in that account? A. \$22,229.37.

Mr. Nyquist: I object to that too, your Honor. That is not a journal or book of original entry. It is merely a ledger sheet with a number of figures there, with nothing on that page to show the origin of the figures.

The Court: Objection overruled. You can bring that out on cross examination, Mr. Nyquist.

(Testimony of Walter E. Otto.)

By Mr. Janin:

Q. How long did Strategic Mineral Exploration Company remain in existence?

A. Well, we started in July, we got running, I guess the beginning of August, we ran about 90 days and then we closed up as rapidly as we could. We lost.

Q. What was the result of the operations during that period?

A. Well, in 90 days we lost better than \$34,000, and subsequently to that there was another, I imagine from \$6,000 to \$10,000. We had to pick up stray odds and ends we didn't know of at the time we tried to liquidate.

Q. What did the petitioner corporation and this partnership do in conjunction with the winding up of the partnership?

A. We paid our bills—what is the question again, [67] please?

Q. I will see if I can rephrase that.

Let me ask you a further question: How did you pay your bills?

A. I imagine we were about a year, year and a half paying those bills. We paid them as fast as we could arrange the money to liquidate. The corporation paid Pacific Vegetable Oil weekly sums, as I recall, from \$250 to \$2500, maybe \$500, maybe \$1,000.

The other outside bills Mr. Balestrieri and I—Hoff reneged on the entire venture and relations were very bitter. We blamed him for the fiasco, and he walked out on us. Mr. Balestrieri and I, we

(Testimony of Walter E. Otto.)

couldn't have any of our affairs attached, so we made arrangements and paid everybody just as fast as we could.

I would say we were a good year to a year and a half cleaning up the bills. We had the corporation paying PVO and Balestrieri and I paying the other outside bills.

Q. Was there any dispute between Strategic Mineral Exploration Company or the partners of that and petitioner corporation?

A. Never.

Q. How was the amount determined that was the share of the Petitioner Corporation?

A. That was the money that was obtained from the Pacific [68] Vegetable Oil Corporation.

Q. Is this a copy, or is this the letter which was written to Pacific Vegetable Oil Company by Otto Sales Company with respect to the financing of this venture by Pacific Vegetable Oil Corporation?

A. Yes, that is the true original.

Mr. Janin: I would like at this time to offer in evidence this letter.

Mr. Nyquist: Offer a copy.

Mr. Janin: I would like to offer a copy of this letter in evidence.

Mr. Nyquist: No objection.

The Court: Accepted in evidence.

The Clerk: Exhibit 5.

(The letter referred to was marked and received in evidence as Petitioner's Exhibit No. 5.)

(Testimony of Walter E. Otto.)

Mr. Janin: Your witness.

Cross Examination

By Mr. Nyquist:

Q. Mr. Otto, it says in the petition which your corporation filed in this court that Joe Balestrieri and W. E. Otto are the sole stockholders of the taxpayer corporation. Was that condition true throughout the taxable year 1943?

A. Well, there might have been a qualifying share, or maybe my wife owned some of the stock, or maybe Joe's wife. [69] Mr. Balestrieri and I owned half of that business. I mean, in the family somewhere there was—I can't answer that. Is that clear to you? I don't know exactly.

Q. I gather from your answer that in substance you and Mr. Balestrieri each owned half of the taxpayer corporation. Is that correct?

A. That's right. Where it lay, I can't give it to you.

Q. It further says in your petition that in order to keep the businesses separate it was decided by the officers of the taxpayer corporation to form a partnership to carry out the mining venture, and accordingly the partnership was formed on July 29, 1943. Is that statement correct?

A. Well, that is the day we recorded it. We made the partnership before we started on the deal, Hoff, Balestrieri and ourselves. We entered the agreement, but we had lots of things to handle in the interim, and by the time we got the leases and everything, then we recorded it. That is the date

(Testimony of Walter E. Otto.)

we recorded it, what you say.

Q. But the statement I read says that in order to keep the businesses separated it was decided by the officers of the taxpayer corporation to form a partnership to carry on the mining venture, and accordingly a partnership was formed. Now, aside from the date, is that statement correct?

A. I didn't—in the first place, this is the first time I have heard what you are talking about there, and I have [70] to think a second to give you—it's a long time ago.

Q. Let me rephrase that question. What is the business of the petitioner corporation?

A. Wholesale fish dealers.

Q. And this venture which you were becoming interested in was a chrome mining venture?

A. Yes.

Q. About as far separated from the fish business as one can imagine. It was for that reason that you decided to form a partnership to keep the business separated from the fish business, is that correct?

A. No. We had another identity in there, J. M. Hoff, and he couldn't be in the fish company because personalities didn't jibe. He was going to run the deal, he was the administrator of it, so we had to have it separate, that was all there was to that. It had to be a separate body. There were different identities. He had nothing to do with the fish corporation, Joe Balestrieri and Company.

Q. With respect to your individual financial position in about the middle of 1943, you have just

(Testimony of Walter E. Otto.)

testified that you owned 50 percent of the petitioner corporation. A. Yes, sir.

Q. Did you also own an interest in a fishing vessel?

A. I think we bought a boat that year or the preceding year, from California Packing Corporation. It was not greatly [71] paid for.

Q. I am referring now to Petitioner's Exhibit 5, the letter to the Pacific Vegetable Oil Corporation, signed by the Otto Sales Company.

A. That was my company. See, I had my own business.

The Court: Off the record.

(Discussion off the record.)

The Court: On the record.

By Mr. Nyquist:

Q. Referring again to Petitioner's Exhibit 5, the letter to the Pacific Vegetable Oil Corporation, signed by the Otto Sales Company, by W. E. Otto, what was the relationship of the Otto Sales Company to this transaction?

A. Well, I wrote that letter. That has nothing to do with it. I wrote it on that letter on behalf of the partnership, that is all. I don't know whether they had a letterhead at that time or not.

Q. In other words, although this letter is signed Otto Sales Company, it was written on behalf of the Strategic Mineral Exploration partnership?

A. Yes.

Q. I read to you the postscript from that letter:

(Testimony of Walter E. Otto.)

"I neglected to insert above that should our operations be so unfortunate as to result in a loss no part of this loss will be for your account, but will be taken care of in its [72] entirety by J. M. Hoff, Joe Balestrieri and W. E. Otto."

A. Yes, sir.

Q. After receipt of that letter by Mr. Rocca, the president of the Pacific Vegetable Oil Corporation, did he then indicate that the individual guarantee of J. M. Hoff, Joe Balestrieri and W. E. Otto were not sufficient?

A. He was not interested.

The Court: I understand that has been taken care of by stipulation.

Mr. Nyquist: I wanted to get the sequence. This is dated July 23. I just want to establish the sequence of events there, your Honor.

The Court: Go ahead.

By Mr. Nyquist:

Q. Then it was subsequent to the receipt of this letter that Mr. Rocca insisted upon the Joe Balestrieri Company guaranteeing to protect him in the event of loss?

A. My recollection at the time was that I took that down in my automobile to him and he kind of laughed at me when he saw that guarantee there, and he told me what his ideas were. I immediately carried that back to Mr. Balestrieri to see if that was acceptable, because it was a new feature to the entire transaction.

Q. Then the letter of July 24, marked Peti-

(Testimony of Walter E. Otto.)

tioner's Exhibit 1, which was the offer by the Strategic Mineral Exploration [73] Company to the Joe Balestrieri Company was written subsequent to Mr. Rocca's refusal to—

A. That's right.

Q. Insistence upon the guarantee by Joe Balestrieri Company? A. Yes, sir.

Q. I read to you the paragraph in there again about the guarantee:

"The consideration for this offer is that your corporation agrees to guarantee the payment of any losses or deficits that may occur on the money borrowed from the Pacific Vegetable Oil Corporation on our chrome milling venture."

A. Yes, sir, that is what it says.

Q. In other words, that guarantee is for the protection of the Pacific Vegetable Oil Corporation, is that correct?

A. Yes, sir. The fish company agreed to absorb any loss that might occur. We in turn thought we were doing the fish company a big favor giving them 50 percent.

Q. My question was—will you repeat my last question?

(The question was read by the Reporter.)

Mr. Janin: I think, if your Honor please, that calls very much for the conclusion of the witness, and that the agreements speak for themselves in that respect.

The Court: Isn't that position a little inconsistent with your questioning of the witness on

(Testimony of Walter E. Otto.)

direct examination with [74] regard to the meaning of that phrase?

Mr. Janin: I asked as to the meaning of the phrase. Now counsel is asking as to the effect of the phrase.

Mr. Nyquist: I am asking as to the purpose of the phrase.

The Court: I will construe the question as meaning to inquire from this witness what this witness intended the purpose to be, or what this witness and other parties to it intended the purpose to be.

The Witness: The intent, the purpose, if it be so unfortunate to have a loss, the fish company which had assets, would absorb those losses.

By Mr. Nyquist:

Q. Was it your purpose in entering into this agreement to protect the creditor, the Pacific Vegetable Oil Corporation, from loss?

A. That was Pacific Vegetable Oil's intent. Otherwise we couldn't have the money.

Q. Then was it because Pacific Vegetable Oil insisted on being protected in the event of loss that you entered into this agreement?

A. Well, they laid down the stipulation. That is all there was, we could either go that way, or we couldn't have the money.

Q. Then I gather from your answers to these questions [75] that it was your intention, at least in writing this letter containing the offer and in acting as a director of the Balestrieri Company in

(Testimony of Walter E. Otto.)

accepting the offer, to protect the Pacific Vegetable Oil Corporation from loss, so that they would enter and extend the credit to you. Is that correct?

A. Well, it's slightly altered because in order to interest the corporation, Mr. Balestrieri, to get into the corporation, we had to give them fifty percent of what it might make, of what we'd earn.

Q. In other words—

A. "Yes and no" is the answer to that. I am trying to be fair to counsel.

Mr. Janin: I will stipulate that was a part of the purpose, counsel, certainly part of the purpose.

By Mr. Nyquist:

Q. Referring again to the language, "Any losses or deficits that may occur on money borrowed from the Pacific Vegetable Oil Corporation," will you explain just how, in your opinion, it is possible for a partnership to sustain a loss or a deficit on moneys which it borrows from some outsider.

A. Well, that is very easy. Use the borrowed money to perform the operation. If the operation should show a loss as a definite loss, that is very simple.

Q. There is a loss?

A. Instead of selling stock or getting people to come in, [76] you borrow money for a certain venture. You understand the Pacific Vegetable Oil was to receive twenty-five percent of any earnings

(Testimony of Walter E. Otto.)

that might have been made, but were not responsible for any losses.

Q. Let me explain my question again. In the case of money owed to a partnership, for example, I believe we can all understand how a partnership could sustain a loss in the event that the party who owed it to the partnership defaulted. But how can a partnership in your opinion sustain a loss on money which it owes to somebody else?

A. Well, very easily. That money was used to operate a venture. That is what the venture was, and what that borrowed money actually lost itself and additional money—

The Court: Your idea is that if you hadn't been able to borrow from Pacific Vegetable you wouldn't have gone on with it and you wouldn't have lost any money. Is that it?

The Witness: That's right.

By Mr. Nyquist:

Q. You have testified that you and Mr. Balestrieri were each fifty percent owners of the Joe Balestrieri and Company.

A. That's right, yes.

Q. Just what was your purpose in wanting to shift any loss that might occur from the partnership to the corporation?

Mr. Janin: If your Honor please, I object to the word "shift" in there. I think that definitely calls for the [77] conclusion of the witness. If he will rephrase his question I have no objection to the explanation of the purpose here drawn out.

(Testimony of Walter E. Otto.)

Mr. Nyquist: If it suits petitioner's counsel better I will rephrase the question.

By Mr. Nyquist:

Q. What was your purpose in wanting the Petitioner corporation to assume any losses which would otherwise have fallen on the partnership?

A. Well, that started with Pacific Vegetable Oil's order to us. It had to be that way.

Q. In other words, the purpose was to protect the creditor so that he would extend the credit. Is that true?

A. I can't answer what was in Mr. Rocca's mind, but unless our corporation was a party to that, we could not proceed.

Q. At the time this contract was made, did you discuss with anyone the effect of the contract upon your tax liability as individuals, or upon the corporation's tax liabilities?

A. Never thought of it at that time.

Q. When was the first time that that aspect of the problem came to your attention?

A. When Mr. Balestrieri called me on the phone and told me that somebody was down there from the government and didn't think they were going to allow it. [78]

Q. Was that the first time that the full significance of this, that you realized the full significance of this contract?

A. Yes, sir.

Q. And that you realized that it was for your protection as well as Pacific Vegetable Oil?

(Testimony of Walter E. Otto.)

A. Well, I never thought much about my protection there, because we entered this, as I tell you, I was pretty thin financially, and any place to try to make some money, that is all.

Q. With respect to this credit that Pacific Vegetable Oil extended to the partnership, throughout the period of a few weeks that the partnership was operating, were payments made from time to time to the Pacific Vegetable Oil as well as credit being extended?

A. That I don't know. I mean, I would imagine if we got a carload of chrome milled and there was any surplus money left after the payroll was made, it would certainly take it down to Pacific Vegetable Oil. See, the only returns we received was the concentrate chrome we were selling to the government, and as we'd ship a car we'd have some proceeds. Now, I don't know where the overlap came.

Q. Will you explain to us, please, under your interpretation of this contract, just how you understand that the extent of the liability of Joe Balestrieri Company is to be [79] determined.

A. Well, we gave them 50 percent interest for agreeing to stand behind the deal for us, and there was a loss of \$22,000 on that end of the venture. It was up to them to make that up.

Q. Let us get to that portion of your answer in which you stated there was a loss of \$22,000. Will you explain just how that loss of \$22,000 was, in your opinion, to be determined?

A. Well, that was just figures of what we spent for ore and what we received in concentrates at

(Testimony of Walter E. Otto.)

the mill. That is what we got back, we were just that much short on the operation of the chrome mill.

Q. Was that the amount that was due to the Pacific Vegetable Oil Corporation on the date that you decided to terminate the venture?

A. Yes, sir, yes.

Q. In other words, if the venture had been terminated a few weeks earlier or a few weeks later, the amount would undoubtedly have been different?

A. A few weeks earlier would have been lots less. We didn't have sense enough to terminate it quick enough, let's put it that way.

Q. Or if Pacific Vegetable Oil had extended a little more credit—

A. It would have been more. [80]

Q. It would have been more?

A. That's right.

Q. In other words, the amount of the loss to be absorbed by the Balestrieri Company was dependent upon the amount shown in the account between the partnership and the Pacific Vegetable Oil Corporation?

A. The money was loaned to the partnership, and then in turn was guaranteed by Balestrieri and Company.

Q. Did the Pacific Vegetable Oil Corporation make any demand against you personally for payment of this money?

A. No. They were after the fact that—

(Testimony of Walter E. Otto.)

Q. Your "no" is sufficient.

Was the Joe Balestrieri and Company active investing or making investments or participating in ventures outside of the fish business?

A. No, not generally.

Q. Did the Joe Balestrieri Company have in 1943 sufficient surplus or unneeded working capital to be able to freely participate in ventures outside of its regular fishing business?

A. They could take on limited ventures.

Q. Would they have participated in a venture such as a chrome mining venture like this with an outsider?

A. I can't answer that. I mean, it depends what the proposition might be, how weak you are at the conversation.

Q. Wasn't one of the purposes of the corporation in [81] entering into this guarantee the accommodation of you and Mr. Balestrieri?

A. Well, first Hoff had as big interest as we had in the deal, and the next was we, the three partners, thought we were letting the fish company in for a very lucrative earning, not a loss.

Mr. Nyquist: Move that be stricken as not responsive to the question.

Mr. Janin: I think it is responsive to the question.

The Court: I will deny the motion.

Mr. Nyquist: I will repeat the question.

By Mr. Nyquist:

(Testimony of Walter E. Otto.)

Q. Was not one of the purposes of the corporation in entering into this agreement to accommodate you and Mr. *Otto* by enabling you to get credit for your partnership which you otherwise would not be able to get?

A. One of the purposes, yes, was the accommodation; but in the main, for the corporation, was the earning that was possible, that we expected to make.

Q. Do you recall when the amount due to the Pacific Vegetable Oil Corporation was paid?

A. I think it was paid all during the year '44. I think the corporation gave Pacific Vegetable a definite note for that when we set the amount up. That is my recollection, and I think we could possibly get that note. [82]

Mr. Nyquist: I would like to state at this point that the taxpayer corporation's return states that its books are kept on a cash basis. Now, I presume petitioner's counsel who just came into the case is probably not aware of that, but I will ask him whether that is true.

Mr. Janin: It is true that the return states that. I don't know whether or not the fact is true, whether the books are kept on cash or accrual basis or whether the return was prepared on cash or accrual basis. But it is true that the return states it was prepared on a cash basis.

The Court: It will be assumed, I should think, that they were kept on a cash basis.

Any other questions?

Mr. Nyquist: No further questions.

The Court: Any redirect?

Mr. Janin: No redirect, your Honor.

The Court: That is all.

(Witness excused.)

The Court: Do you have another witness?

Mr. Janin: Yes. I would like to call Mr. Balestrieri.

Whereupon,

JOSEPH BALESTRIERI,

called as a witness for and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination [83]

The Clerk: State your name and address.

The Witness: Joseph Balestrieri, 44 Avila St.
By Mr. Janin:

Q. Mr. Balestrieri, when did you first learn of this chrome milling and mining venture?

A. 1943.

Q. From whom did you learn about it?

A. Mr. Hoff and Mr. Otto.

Q. Was there any discussion at your Board of Directors meeting on July 26th, 1943, when the proposal of Strategic Mineral Exploration Company was presented to the petitioner corporation?

A. There was.

Q. Can you tell us the general purport of that discussion?

A. They brought me a proposition in to operate this mill. They were out to borrow some money,

(Testimony of Joseph Balestrieri.)

and the way they borrow the money would have to have a guarantee from Joe Balestrieri and Company.

I asked the question what will Joe Balestrieri get in return to guarantee this loan. The answer to me, they would give fifty percent of the profit, if any profits were made.

When they made the proposition to me I took the deal on it, and I went on record, borrowed direct, guaranteed the payment any money borrowed for operating the mill, if there was any [84] loss.

Q. When the venture wound up some 90 days later, what did the petitioner corporation do with respect to the obligation of Strategic Minerals Company to Pacific Vegetable Oil Corporation?

A. Well, we had about \$39,000 loss that come in this venture. \$22,000 is to the Pacific Vegetable Oil Company, and the balance was owed to other dealers. So Balestrieri guaranteed to absorb any loss for the Pacific Vegetable Corporation, so Balestrieri Company, he took the loss on themselves, and the loss was took on by W. E. Otto and myself personally. Hoff, he didn't want to have any part of it. So we paid the balance of the bill between the two of us. And I am telling you it was no fun.

Q. Did the petitioner corporation give anything to Pacific Vegetable Oil Company to assure Pacific Vegetable Oil Company of the recognition by petitioner of this obligation to it?

(Testimony of Joseph Balestrieri.)

A. We gave them a note, showed that we owed that much money to them.

The Court: When did you give it to them?

The Witness: No—November, I think it was, November I think we gave them a note in November. I don't recall the date.

The Court: November '43? [85]

The Witness: '43, yes.

Mr. Janin: I have no further questions.

The Court: Proceed.

Cross Examination

By Mr. Nyquist:

Q. Showing you Petitioner's Exhibit 2, the minutes of the meeting of the Board of Directors of the Joe Balestrieri Company on July 26, 1943, this copy shows that it was approved by you as President. Did you sign the original as President approving the minutes? A. I did.

Q. Did you read before you signed?

A. I read now, often.

Q. It plainly states therein that the proposal was to participate in one-fourth of the earnings of the chrome mining venture.

A. That is correct. I noticed that yesterday.

Q. That is, this copy says one-fourth, the original minutes say one-fourth.

A. The original minutes say one-fourth, and the agreement meant fifty percent. But I didn't notice until yesterday when I read the minutes.

Q. In other words, at that time you really

(Testimony of Joseph Balestrieri.)

weren't particularly concerned whether it was a fourth or one-half; is that correct? [86]

A. Oh, yes, it was that. I understand it was fifty percent.

Q. You understood it was fifty percent?

A. Definitely.

Q. But that wasn't a matter of sufficient importance to bring itself to your attention when you read and approved these minutes; is that correct?

A. Well, I tell you when they write these minutes I very seldom look at it. I tell you the reason why I don't look at it, because my daughter happens to be my secretary and I don't pay much attention to the minutes. I take it for granted whatever she writes is all right with me.

Q. Will you please state again your understanding of exactly what the corporation was guaranteeing to do under this agreement?

A. We were supposed to guarantee any money was borrowed from the PVO, Pacific Vegetable Oil, Incorporated.

Q. You were to guarantee they would be paid back?

A. They'd be paid back, definitely. In return we were supposed to receive fifty percent of the profit of this venture which would make me rich overnight.

Q. You owned half of the stock of the Balestrieri Company? A. I do.

Q. You did throughout the year 1943?

(Testimony of Joseph Balestrieri.)

A. I did. [87]

Mr. Nyquist: No further questions.

The Court: Any redirect?

Mr. Janin: Yes, just a couple of questions, your Honor, please.

Redirect Examination

By Mr. Janin:

Q. As far as you know, were any of the letters involved in this proceeding drawn by an attorney; the minutes were not drawn by an attorney, were they? A. No.

Q. Was the acceptance of the petitioner corporation of the offer of Strategic Mineral Exploration Company drawn by an attorney?

A. I don't quite follow you. Repeat that.

The Court: Did you get a lawyer to write any of these papers for you?

The Witness: No, not that I know of, no.

By Mr. Janin:

Q. What was your understanding as to what would happen under these agreements in the event that Strategic Mineral Exploration Company sustained a loss on its operations of the milling venture, and therefore, for that reason was unable to pay back to Pacific Vegetable Oil Company the amount of the loan borrowed for that purpose? What was your understanding as to what would happen there as between the partnership and [88] your own corporation.

A. Well, my understanding was that we are supposed to guarantee Pacific Vegetable Oil Com-

(Testimony of Joseph Balestrieri.)

pany if there was a loss in the mill. They are the only bill we are supposed to guarantee from the corporation. No other bills.

Q. Assume that the partners in that concern had individually been financially solvent so that they could have readily paid from other assets.

Mr. Nyquist: Objection, your Honor. This method of phrasing the question, assuming so many things, takes on the air of a leading question.

Mr. Janin: Your Honor, this is deliberately a leading question because it is cross examination on a matter I did not go into on direct examination.

The Court: I will overrule the objection. Go ahead.

By Mr. Janin:

Q. Assuming that the partnership had been fully able to pay the amount of the loan, or the partnership itself had lost money and didn't have any assets, what was your understanding as to who should pay the obligation to Pacific Vegetable Oil Corporation as between the partners and the petitioner corporation?

A. Well, understanding it was the corporation would stand for the loss of the money borrowed from Pacific Vegetable Oil only. [89]

The Court: Any further questions?

Mr. Janin: I have no further questions.

Mr. Nyquist: No further questions.

The Court: That is all, sir.

(Witness excused.)

The Court: I think I should state to counsel in order that there be no misunderstanding as to proof that I will take it for the purposes of this case that the petitioner corporation is on a cash basis of accounting, and that it executed its note to the Pacific Vegetable Oil Company in November 1943 calling for the payment of \$22,292.37, and that payments were made on that obligation in 1944 in weekly amounts, and the payments were not begun until 1944 and were not completed until 1944.

Mr. Janin: Certainly we have not proved any payments in 1943, your Honor. Whether there were any, I don't know, but if so, they were trivial.

Mr. Nyquist: With respect to that note, petitioner's counsel has been unable to obtain a copy of it, but I understand that the note was given—my records indicate there was a note given, and I will so stipulate.

The Court: Petitioner rests?

Mr. Janin: Petitioner rests, your Honor, except I would like to have leave to amend the petition in this case to conform to the proof adduced here this morning. I don't think [90] that the petition accurately sets forth the controversy, and I think that it would be a help to have the petition rephrased in part.

The Court: Well, leave will be granted, and leave will be granted to the Respondent to file appropriate answer.

As I understand it, it is merely for the purpose of perhaps better stating the petitioner's position, but without any change in the position. Is that correct?

Mr. Janin: Without any substantial change. There is one change which might be regarded as being somewhat substantial, and that is in the petition I believe that it is alleged that the corporation was to receive twenty-five percent of the profits of the venture, whereas, the proof as adduced this morning, I think rather clearly shows that it was fifty percent.

The Court: Leave will be granted. You don't have the amendment at present?

Mr. Janin: We do not have it prepared yet.

The Court: Leave granted. You can file it within fifteen days, I should think.

Respondent will be given fifteen days to file an answer, if he cares to.

Mr. Nyquist: If that is the only type of amendment respondent would have no objection to the amendment that petitioner's counsel has just suggested.

The Court: The understanding is the amendment will [91] be made only for the purpose of conforming the pleadings to the proof.

The briefs will be filed pursuant to the rules.

Mr. Janin: That is satisfactory.

Mr. Nyquist: Your Honor, on the Pacific Coast here we have a problem of mail. We frequently don't receive a brief until a week after it is filed.

We have to allow a week to get it back, through brief review and to the Court.

The Court: Let's add ten days to each period. Instead of 45 days, 55 days; instead of 15 days for the reply brief, 25 days.

Mr. Nyquist: Thank you, your Honor.

(Whereupon, at 10:50 a.m., the hearing in the above-entitled matter was closed.) [92]

PETITIONER'S EXHIBIT No. 4

(Copy)

ARTICLES OF CO-PARTNERSHIP

This Agreement made on this First day of July, 1943, by and between John M. Hoff, hereafter called First Party, and Joe Balestrieri, hereafter called Second Party, and W. E. Otto, hereafter called Third Party,

Witnesseth:

That the parties hereto are desirous of forming a co-partnership, and do hereby form a co-partnership wherein each of the parties hereto, shall have equal interests. The said partnership shall operate under the name of Strategic Minerals Exploration Co.

That the said partnership will engage in the business of prospecting for, buying and selling mines and interests in mines, metals, strategic materials of all kinds and characters, and mining machinery and equipment, and to perform services in the nature of mining engineering.

First party hereto, will devote his full time and attention to the carrying on and conducting of the aforesaid operation, and to that end, will travel to any point or points necessary to transact and develop any properties prospect of acquisition or acquired.

The Second and Third parties hereto, will provide First party with an office in San Francisco, and with telephone and other services necessary or convenient for the carrying out of said operations.

Second and Third parties hereto, will provide First party with all necessary traveling expense, and the sum of Fifty Dollars (\$50.00) [93] per week, for his maintenance for a period of six (6) months from the execution hereof, and First party will use and employ his automobile in connection with the said venture.

Any and all profits from the said venture, will be shared equally between the parties hereto after first reimbursing Second and Third parties for any sums advanced to First party for expenses or maintenance.

The First party shall not make nor enter into any agreement to purchase or sell, or any agreement binding upon the partners, without having first obtained the consent and approval of Third party.

The parties hereto shall keep and maintain good and sufficient books of account, from which at all

times the condition of the said partnership may be ascertained, and which said books of account shall at all times be open to and available to any or all of the parties hereto.

In Witness Whereof, the parties hereto have caused these presents to be executed this First day of July, 1943.

/s/ J. M. HOFF,

/s/ W. E. OTTO,

/s/ JOSEPH BALESTRIERI. [94]

(Copy)

CERTIFICATE OF CO-PARTNERS TRANS-
ACTING BUSINESS UNDER FICTITIOUS
NAME

Know All Men By These Presents:

That we, the undersigned, John M. Hoff, Joe Balestrieri, and W. E. Otto, do hereby certify that we are co-partners transacting business in the State of California, under the fictitious name and style of Strategic Minerals Exploration Co., and that the principal place of business of said co-partnership, is situated at No. 255 California Street, in the City and County of San Francisco, State of California, and that the names in full of all the members of said co-partnership and their respective residences, are as follows: John M. Hoff, 1944 - 8th Avenue, Oakland, California; Joe Balestrieri, 44 Avila Street, San Francisco, Calif.; W. E. Otto, 90 Ramona Street, Piedmont, Calif.

In Witness Whereof, we have hereunto set our hands this first day of July, 1943.

/s/ J. M. HOFF,
/s/ JOE BALESTRIERI,
/s/ W. E. OTTO. [95]

(Copy)

State of California,
City and County of San Francisco—ss.

On this day of July, 1943, before me
....., a Notary Public in and for the City
and County of San Francisco, State of California,
personally appeared John M. Hoff, Joe Balestrieri
and W. E. Otto, known to me to be the persons
whose names are subscribed to the foregoing instru-
ment, and they acknowledged to me that they
executed the same.

In Witness Whereof, I have hereunto set my
hand and affixed my official seal at my office in
the City and County of San Francisco, State of
California, the day and year in this certificate first
above written.

.....,

Notary Public, in and for the City and County of
San Francisco, State of California. [96]

* * * *

QUESTIONS

1. Date of incorporation: 2/15/1941.
2. State or country: Calif.
3. State collector's office where the corporation's return for the preceding year was filed: S. F.
4. Corporation's books are in care of Main Office, 432 Clay St., San Francisco.

* * * *

6. Did the corporation during the taxable year have any Government contracts or subcontracts? (Answer "yes" or "no"): No. If answer is "yes," state the approximate aggregate gross dollar amount billed during the taxable year under all such contracts and/or subcontracts. (See Instruction G-(3).): \$ No.

7. Is the corporation a personal holding company within the meaning of section 501 of the Internal Revenue Code? No.

8. Is this a consolidated return? No.

9. If this is not a consolidated return: (a) did you own at any time during the taxable year 50 percent or more of the voting stock of another corporation either domestic or foreign? No.

10. Is this return made on the basis of cash receipts and disbursements? Yes.

11. Did the corporation at any time during its taxable year have in its employ more than eight individuals? (Answer "yes" or "no"): Yes. If answer is "yes," has the corporation in this return taken a deduction for any amount of wages or salaries representing an increase or decrease in rate? (Answer "yes" or "no"): No.

12. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower: Cost.

13. Did the corporation make a return of information on Forms 1096 and 1099 or Forms V-2 and W-2 for the calendar year 1943 (see Instruction G-(1))?
Yes.

14. Did the corporation at any time during the taxable year own directly or indirectly any stock of a foreign corporation? (Answer "yes" or "no"):
No.

[99]

* * * *

[100]

JOE BALESTRIERI & CO.

1943

ITEM 29—SCHEDULE D—OTHER DEDUCTIONS:

Wharf Expenses	\$ 2,728.76
Advertising	124.65
Automobile Expenses	3,047.87
Communications	2,369.01
Freight	3,363.75
Insurance	2,612.11
Office Supplies	856.13
Utilities	2,686.78
Miscellaneous	818.90
Travel Expenses	1,388.09
Entertainment	1,117.40
Commissions	5,430.38
Legal-Auditing	1,426.25

 \$27,970.08

SCHEDULE F—COMPENSATION OF OFFICERS:

Joe Balestrieri, 44 Avila, President. Full time.....	\$ 4,200.00
Walter E. Otto, 90 Ramona Ave., Piedmont, Vice-Pres. and Secretary. Part time	\$ 2,100.00

 \$ 6,300.00

SCHEDULE H—Taxes:

Social Sec. & Unempl.	\$1,218.76		
Automobile Taxes	153.90		
Capitol Stock	9.29		
City of S. F.	756.23		
State Franchise	528.29		
Declared Value E. P. Tax.....	625.00	\$ 3,291.47	
[In longhand]: Corp stock OK			

SCHEDULE J—DEPRECIATION:

Automobile	\$1,252.55		
Furniture and Fixtures.....	1,044.11		
Building	732.02	\$ 3,028.68	

SCHEDULE L—[Illegible]

Assets	Dec. 31, 1942		Dec. 31, 1943	
Current Assets				
Cash on Hand.....	\$ 75.00		\$ 100.00	
Bank Account	1,844.69		1,001.29	
Accounts Receivable	18,490.81		27,726.71	
Bering Sea Codfish Co.....	11,100.00	\$31,510.50	8,461.21	\$ 37,289.21
Merchandise Inventory	\$31,273.69		\$44,740.22	
Supplies	1,700.05	\$32,973.74	5,619.05	\$ 50,359.27
Capital Assets				
Automobiles	\$ 5,277.23		\$ 6,094.73	
Furniture & Fixtures.....	3,546.08		3,824.63	
Equipment & Machinery....	4,498.10		5,812.26	
Building & Improvements..	14,513.12		15,050.42	
	\$27,834.53		\$30,782.04	
Less: Depreciation	3,390.74	\$24,443.79	6,419.42	\$ 24,362.62
or Bragg Investment.....		1,250.00		
[In longhand]: Improvmts.				
Deferred Payments:				
Insurance Prepaid	907.29		1,606.32	
Rent Prepaid	346.25	1,253.54	346.25	1,952.57
		\$91,431.57		\$113,963.67

SCHEDULE L—(Continued)

	Dec. 31, 1942		Dec. 31, 1943	
Liabilities & Net Worth				
Accounts Payable	\$25,388.31		\$26,179.38	
Pacific Vegetable Oil.....	30,364.00		49,161.38	
Notes Payable	8,623.04		4,515.29	
Taxes Payable	568.12	\$64,943.47	570.13	\$ 80,426.00
Mortgages		7,113.41		6,249.50
Capital & Surplus				
Capital Stock				
Authorized	\$25,000.00		\$25,000.00	
Unissued	17,570.00		17,570.00	
Paid in	\$ 7,430.00		\$ 7,430.00	
Paid in Surplus	5,772.55		5,772.55	
Earned Surplus & Un-				
divided Profits	6,172.14	19,374.69	14,085.38	27,287.90
		\$91,431.57		\$113,963.00

SCHEDULE M—RECONCILIATION:

3	Federal Income Tax.....	\$ 946.76	13	\$ 5,401.50
11	Earned Surplus.....	14,085.38	14	9,630.50
12	Total.....	\$15,032.14		\$ 15,032.14

RESPONDENT'S EXHIBIT B
(Admitted in Evidence Mar. 25, 1948)

Form 1121—Treasury Department, Internal Revenue Service. 1943

[Stamp]: Received March 15, 1944, Collector of Int. Rev., First Dist. Calif.

United States
Corporation Excess Profits Tax Return
For Calendar Year 1943

Name and address: Joe Balestrieri & Co., 432 Clay Street, San Francisco, California.

Business group serial number entered on page 1, Form 1120: 131.

Excess Profits Tax Computation

Item and Instruction No.	Column 2	
	Invested Capital	Credit Method
1. Excess profits net income (line 16, Schedule A)....	\$ 10,781.58	
2. Specific exemption	5,000.00	
3. * * * *		
4. Excess profits credit—based on invested capital (line 41, Schedule C).....	4,454.77	
5. Unused excess profits credit adjustment (attached schedule)	2,424.56	
6. Total of lines 2 to 5.....	\$ 11,839.33	
7. Difference between item 1 and item 6.....	\$ (1,057.75)	
* * * *		
24. Excess profits tax due (item 22 plus item 23, or item 22 minus item 23, whichever is applicable)....	\$ None	
* * * *		

We, the undersigned, president (or vice-president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including any accompany schedules and statements) has been examined by him and is to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued thereunder.

/s/ JOSEPH BALESTRIERI,

President.

/s/ W. E. OTTO,

Vice-President and Sec'y.

Subscribed and sworn to before me this 6th day of March, 1944.

(Seal) /s/ JOSEPH A. TORASSA,

Notary Public, in and for the City and County of San Francisco, State of California.

I swear (or affirm) that I prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the excess profits tax liability

of the person for whom this return has been prepared of which I have any knowledge.

/s/ JOHN L. FLYNN,

1211 Russ Bldg.,

San Francisco, California.

(Signature of person preparing the return)

Subscribed and sworn to before me this 6th day of March, 1944.

(Seal) /s/ JOSEPH A. TORASSA,

Notary Public, in and for the City and County of San Francisco, State of California. [103]

* * * *

Schedule A.—Excess Profits Net Income Computation

Line No.	Column 2 Invested Capital Credit Method
1. Normal-tax net income (computed without allowance of credit for income subject to excess profits tax and without allowance of dividends received credit) (item 37, page 1, Form 1120).....	\$ 9,630.36
* * * *	
5. 50 percent of interest on borrowed capital.....	1,151.22
* * * *	
7. Total of lines 1 to 6.....	\$10,781.58
* * * *	
18. Excess profits net income computed under income credit method or invested capital credit method (line 16, or line 16 minus line 17 in case of a life insurance company)	\$10,781.58
* * * *	

Schedule C.—Excess Profits Credit—Based on Invested Capital

Equity Invested Capital at the Beginning of the Taxable Year
(See Instructions for Schedule C, lines 1 to 12, inclusive)

Line No.

1. Money paid in for stock, or as paid-in surplus, or as a contribution to capital).....	\$13,202.55
* * * *	
4. (a) Accumulated earnings and profits....	\$14,531.95
* * * *	
(d) Accumulated earnings and profits (item 4 (a) as adjusted by item 4 (b) and (c).....	14,531.98
5. 25 percent of new capital paid in during a taxable year beginning after December 31, 1940.....	1,443.13
* * * *	
8. Total of lines 1 to 7.....	\$29,177.63
* * * *	
14. Equity invested capital at beginning of taxable year (line 8 minus line 13).....	\$29,177.63
Average Addition to Equity Capital During the Taxable Year (See Instructions for Schedule C, lines 1 to 12, inclusive)	
* * * *	
22. Total of lines 14 to 21	\$29,177.63
* * * *	
28. Average equity invested capital (line 22 minus line 27)	\$29,177.63
29. Average borrowed capital, attach sched.)	\$53,013.34
30. Average borrowed invested capital (60 per cent of line 29)	26,506.67
31. Average invested capital (line 28 plus line 30).....	\$55,684.30
* * * *	
36. Invested capital (line 31, minus line 35).....	\$55,684.60
37. Portion of line 36 (not in excess of \$5,000,000) ; and credit at 8 percent	\$ 4,454.77
* * * *	
41. Excess profits credit—based on invested capital (total of lines 37 to 40).....	\$ 4,454.77

[Endorsed]: T.C.U.S. Filed April 2, 1948. [106]

The Tax Court of the United States

Docket No. 12834

[Title of Cause.]

Louis Janin, Esq., for the petitioner.

C. W. Nyquist, Esq., for the respondent.

MEMORANDUM FINDINGS OF FACT
AND OPINION

Respondent has determined a deficiency in petitioner's excess profits tax liability for the year 1943 in the sum of \$25,021.71. The only error alleged in the amended petition is as follows: "The Commissioner erred in disallowing the loss of \$22,-229.37, or any part thereof, resulting from a business venture between petitioner and Strategic Mineral Exploration Co., a partnership." Respondent has disallowed this alleged loss as not being "an allowable deduction under section 23 of the Internal Revenue Code." [107]

FINDINGS OF FACT

Petitioner is a corporation organized in 1941 under the laws of the State of California. Its business is that of a wholesale dealer in fish. Its corporation income and declared value excess profits tax and corporation excess profits tax returns for the year 1943 were filed, on a cash basis, with the

collector of internal revenue for the first district of California.

Petitioner's capital stock was entirely owned by Joe Balestrieri and W. E. Otto, or by members of their immediate family. Balestrieri was president of petitioner and Otto was vice-president. Both were members of petitioner's Board of Directors.

In the early summer of 1943, one J. M. Hoff, a mining engineer, approached Otto, in his individual capacity, with a proposition for the mining and milling of chrome ore. Thereafter, Otto introduced Hoff to Balestrieri. In July 1943, after several conversations and after each had convinced himself that very large profits would be derived from the mining and milling of this ore, the three individuals named (Hoff as party of the first part, Balestrieri as party of the second part, and Otto as party of the third part) executed Articles of Co-partnership, which are incorporated herein by reference, and which provide, in substance, as follows: Each party would have an equal interest in the partnership, which would operate under the name of Strategic Mineral Exploration Co. and should engage "in the business of prospecting for, buying and selling mines and interests in mines, metals, strategic materials of all kinds and characters, and mining machinery and equipment, and to perform services in the nature of mining engineering." Hoff was to devote his full time and attention to the carrying on of the business of the partnership. Balestrieri and Otto were to [108] provide an office and provide Hoff with traveling

expenses and money with which to maintain himself for a period of six months. The profits were to be shared equally between the partners, after reimbursing Balestrieri and Otto for any sums advanced. Shortly thereafter, a "Certificate of Co-partners Transacting Business Under Fictitious Name" was filed with the county clerk in San Francisco, certifying that the three above-named individuals were "all the members of said co-partnership."

In order to secure finances for the partnership, Otto, on behalf of the partnership, approached the Pacific Vegetable Oil Corporation, with which concern the petitioner and Balestrieri and Otto had had previous business dealings. After a conversation with one of the officers of that corporation, Otto, on behalf of the partnership wrote to the Pacific Vegetable Oil Corporation the following letter:

July 23, 1943

Pacific Vegetable Oil Corp.
62 Townsend Street
San Francisco, California
Attention: Mr. B. T. Rocca

Dear Mr. Rocca:

Subject: Financing chrome ore through plant
of the Montrose Mine & Milling Company—
Castella

This is to confirm conversation wherein you agreed to finance the purchase of Chrome ore and

milling and the discounting of the invoices upon the following basis: Funds are to be provided for the purchase of ore, about as follows:

1. Chrome ore—Expected Avg. price: \$12.00 per ton 2240 lbs.

2. Milling ore: \$2.50 per ton 2240 lbs.

3. Freight on Concentrates to Sacramento: \$4.00 per ton 2240 lbs.

From the above, and based on 100 tons a day, a 10 day run will require approximately \$15,000.00; if 200 tons, and this is expected within 60 days, it will require \$30,000.00.

A Partnership, Strategic Minerals Exploration Co., consisting of J. M. Hoff, W. E. Otto and J. Balestrieri, will buy this ore. It will be milled in the mill of the Montrose Mine and Milling Company. [109]

The concentrated chrome will then be shipped to the Metals Reserve stock pile at Sacramento on a straight bill of lading which will be consigned to us. The railroad company will furnish weight tag; Abbot Hanks will sample car at Sacramento and furnish us with assay certificate; Montrose Mine & Milling Co. will prepare invoices and assign invoices to Strategic Minerals Exploration Co., who in turn will assign invoices to you. When the invoices have been assigned to you, procedure is as follows. We first figure out what you have advanced against the car, namely:

COST OF ORE

Milling

Freight on concentrate

The above costs are added and the difference between the above costs and the invoice value you then advance 80% to the Montrose Mine & Milling Co. This we do until the sum of \$80,000.00 has been paid. The remaining 20%, one-fourth goes to you for financing; one-fourth to Strategic Minerals Exploration Co. and one-half held by you to liquidate Otto Sales Company accounts. When Otto Sales Co. account has been paid in full, then this one-half share will be paid to Strategic Minerals Exploration Company. When the sum of \$80,000.00 has been paid to Montrose Mine & Milling Company, Strategic Minerals Exploration Co. will then participate in all earnings on a 50-50 basis.

As long as you are financing the deal, you will receive 25% of our net earnings—never any part of the mill owners' share of earnings.

When it is no longer necessary for you to finance the milling operations, you will participate to the extent of 10% of our share of the earnings for the duration—our share being either 20% or 50%.

We will be very pleased to issue you notes for all sums of money advanced for ore or against invoices.

The write [sic] has made an extensive investigation of the mill operation, seen the plant running; and under extremely competent mill operating

engineers it is turning out a very fine product on a profitable basis.

The writer has also personally investigated the financial setup of the Montrose Mine & Milling Company and it is in perfect shape. Our setup is such that as soon as we buy the ore and own it and pay the mill for milling it there is no possible prospect or hazard of any unknown thrid [sic] party entering the scene and causing any trouble. Considerable time, thought and study was given this feature and the entire operation set up to eliminate any possible unknown trouble or complication.

The writer at the start of the deal will go to Dunsmuir and personally see to it that the mine producers of ore are paid, and an account will be kept in the local bank of Dunsmuir in the name of S. M. E. Co. and check will only be issued when either signed by W. E. Otto or B. T. Rocca.

We are very appreciative of your agreeing to handle the financing of the above transaction.

Yours very truly,

OTTO SALES COMPANY,

/s/ W. E. OTTO.

[110]

WEO:MW

P.S. I neglected to insert above, that should our operations be so unfortunate as to result in a loss, no part of this loss will be for your account, but will be taken care of in its entirety by J. M. Hoff, Joe Balestrieri and W. E. Otto.

The Pacific Vegetable Oil Corporation indicated that it would agree to the proposition outlined by Otto provided petitioner's Board of Directors would agree to "underwrite" any loss which the Pacific Vegetable Oil Corporation might sustain as a result of its discounting any invoices of the partnership. Thereupon, Otto, on behalf of the partnership, wrote to petitioner the following letter:

Strategic Mineral Exploration Co.

Mines and Mining

255 California Street

Garfield 6236

San Francisco 11, Calif.

July 24, 1943

Joe Balestrieri & Co.

432 Clay Street

San Francisco, California

Gentlemen:

Offer to participate in profits of Chrome Milling Operation to be handled by this partnership in consideration of guaranteeing venture.

With reference to letter written by Otto Sales Company to the Pacific Vegetable Oil Corp. dated July 23, 1943, which was written in behalf of Strategic Mineral Exploration Company, we hereby offer you a one-half participation in any profits that the Strategic Mineral Exploration Company may earn. All as outlined in letter attached hereto.

The consideration for this offer is that your corporation agrees to guarantee the payment of any losses or deficits that may occur on the money borrowed from the Pacific Vegetable Oil Corporation on our chrome milling venture.

In the event that you decide to participate in this venture, please have your Board of Directors ratify same and formally confirm same to us in writing.

Yours very truly,

STRATEGIC MINERAL
EXPLORATION CO.,

/s/ W. E. OTTO.

WEO;b

[111]

On July 26, 1943, the directors of petitioner, consisting of Balestrieri and Otto, held a meeting, the minutes of which are as follows:

Consent to a Special Meeting of the Board of Directors of Joe Balestrieri & Co., a Corporation

The Directors of Joe Balestrieri & Co., a corporation, do hereby consent to the holding of a special meeting of said Board of Directors at the office of said corporation, No. 432 Clay Street, San Francisco, California, at the hour of 2:00 p.m. on July 26, 1943.

Present: Joe Balestrieri, President; W. E. Otto, Vice-President.

1. Minutes of previous meeting, dated February 24, 1943 read and approved.

2. The letter addressed to the corporation by the Strategic Minderal [sic] Exploration Company

was submitted and the proposal to participate in one-fourth of the earnings of the Chrome Milling venture at Castella was accepted. The corporation in turn guaranteed any losses or deficits that may occur on money borrowed from the Pacific Vegetable Oil Corporation on the chrome [sic] milling venture.

3. It was ordered and directed that the president accept the offer.

4. Upon motion duly made by W. E. Otto and seconded by J. Balestrieri, it was unanimously voted and approved to accept and confirm all the above.

5. There being no further business, the meeting was adjourned.

Respectfully [sic] submitted to the Board of Directors of the Joe Balestrieri Co. By, Secretary.

Approved:

.,

President.

/s/ W. E. OTTO.

A mistake was made in these minutes (prepared by a daughter of Balestrieri) in that the minutes referred to "one-fourth of the earnings of the Chrome Milling venture" instead of "one-half."

On the same date petitioner wrote the following letter to the partnership: [112]

July 26, 1943

Strategic Mineral Exploration Co.

225 California Street

San Francisco, California

Gentlemen:

This is to acknowledge receipt of your offer of July 24 for our participation in your Chrome Milling venture as Castella, California, all in accordance of letter written to Pacific Vegetable Oil Corporation as of your letter of July 23rd, 1943. Please be advised that we herewith accept this proposal of yours to participate in the profits of your chrome milling operation and we in turn guarantee any losses should they occur. The Board of Directors this day have had a meeting and all the above has been confirmed by them.

Yours very truly,

JOE BALESTRIERI & CO.,

JOE BALESTRIERI,

President.

JB:b

Petitioner's Board of Directors having taken this action, the Pacific Vegetable Oil Corporation consented to and did discount invoices of the partnership in accordance with its proposal outlined in the letter of July 23, 1943.

Before the end of 1943, the partnership had lost approximately \$39,000. The partners decided to cease operations and to liquidate the partnership business. Considerable bitterness developed between

Balestrieri and Otto on one hand and Hoff on the other. Hoff refused to assume any responsibility for the losses of the partnership and "walked out on" Balestrieri and Otto.

There was due to the Pacific Vegetable Oil Corporation, on account of its financial dealings with the partnership, the sum of \$22,229.37. In 1943, petitioner executed its note in that amount to the Pacific Vegetable Oil Corporation, but payments thereon were not made by petitioner until the following year. The other unpaid bills of the partnership, in the approximate sum of \$17,000, were paid gradually by Balestrieri and Otto. [113]

OPINION

Kern, Judge: The question in this proceeding is whether the effect of the transactions detailed in our findings was to make the petitioner a guarantor of the liabilities of the partnership to the Pacific Vegetable Oil Corporation with the secondary liability incident to a guarantee, or, as petitioner contends, made it in effect a participant in a joint venture with the primary liability of one of the venturers. If the petitioner is held to be a guarantor then our decision must be for respondent since petitioner has failed to prove any payment in the taxable year of the obligation guaranteed which would give rise to any indebtedness to it on the part of the members of the partnership who were primarily liable on the obligation to the Pacific Vegetable Oil Corporation, and, even if such an indebtedness had been created, there is no proof that it was worthless in the taxable year.

Petitioner contends that the language used by laymen acting without advice of counsel in the negotiations and instruments incident to the transactions in question was ambiguous, that the testimony of Balestrieri and Otto indicated the intent of the parties to have been that petitioner was to bear all losses, if any, of a joint venture of which it was to be a party, that the large share of the profits of the venture to which petitioner, by virtue of the agreement, was entitled is more consistent with a joint venture than to a guarantee, and that the word "guarantee" though used in the several documents above referred to may describe either a primary or secondary obligation.

We are unable to reach the conclusion to which petitioner's argument would lead us. [114]

The salient facts emerging from the record are these: Petitioner was a small but prosperous corporation controlled by its two stockholders, Balestrieri and Otto, and engaged in the wholesale fish business. These two individuals were convinced by one Hoff, a mining engineer, that a fortune could be made in a chrome mining and milling venture. After some investigation and a preliminary survey, Balestrieri, Otto and Hoff formed a partnership to engage in this venture. The partnership agreement contemplated that Hoff would contribute his services and that Balestrieri and Otto would defray the expenses and the profits, anticipated to be a huge amount, would be divided equally among the three. Funds in a considerable amount became necessary for the purchase of chrome and the

expense of milling it. Otto, on behalf of the partnership, approached the Pacific Vegetable Oil Corporation in an effort to obtain a large part of such funds from this corporation. The corporation would not furnish such funds on the unsecured obligation of the individual partners, but indicated that it would furnish funds if repayment was "underwritten" by petitioner. Thereupon Otto, on behalf of the partnership, wrote to petitioner corporation (all of the stock of which was owned by him and Balestrieri) offering to petitioner "a one-half participation in any profits that [the partnership] may earn" in return for an agreement by petitioner "to guarantee the payment of any losses or deficits that may occur on the money borrowed from the Pacific Vegetable Oil Company on our chrome milling venture." Petitioner's Board of Directors adopted a resolution accepting this offer. Thereafter, the Pacific Vegetable Oil Corporation furnished funds to the partnership. The record does not contain any instrument setting forth the terms of the obligation created thereby. It may be supposed that if any [115] existed it was signed by the three partners. It may also be supposed that the only evidence of petitioner's liability in the transaction is contained in Otto's letter to it, the resolution of its directors, and its letter to the partnership. At that time neither petitioner nor the partnership considered any loss likely in connection with the transactions with the Pacific Vegetable Oil Corporation, or otherwise. When the partnership's business proved unprofitable and was

discontinued, Hoff disappeared from the scene in an atmosphere of mutual recriminations, petitioner gave its note to the Pacific Vegetable Oil Corporation in the approximate amount of \$22,000, then due to that corporation, which was paid by petitioner after the taxable year, and Balestrieri and Otto paid the other accounts due from the partnership in the approximate amount of \$17,000.

These facts persuade us that petitioner's role in the transaction was that of a guarantor of a specific account.

Petitioner places considerable reliance upon the testimony of Balestrieri and Otto, which was rather general in character, to the effect that the parties intended that petitioner should participate as a principal in a joint venture in consideration for its agreement to underwrite and absorb all losses which might be sustained by the venture. Both of these witnesses impressed us as being respectable men, but the force of their testimony is weakened by the following considerations: (1) It was given some five years after the event, (2) it was highly self-serving, and (3) it is inconsistent with the known facts, in that petitioner paid not all of the losses or debts of the venture but only the account of the partnership which it specifically guaranteed.

Petitioner also relies in his argument upon the fact that the consideration moving to petitioner for its assumption of liability in the transaction was unduly generous if the liability assumed was only that of a guarantor, but was not unduly large if it assumed general primary liability for all of

the debts of a joint venture in which it was a participant. The force of this argument, however, is weakened by reason of the fact that Balestrieri and Otto owned all of petitioner's stock and, so far as the record discloses, conducted all of the financial negotiations on behalf of the partnership. Since each of them would receive half of petitioner's profits while receiving only one-third of the profits of the partnership, it was to their interests to divert as much as possible of the large anticipated profits of the partnership to the petitioner corporation regardless of the quid pro quo obtained from petitioner; and we are, therefore, unwilling to look upon the transaction as wholly at arm's length so far as petitioner and those acting for the partnership are concerned.

Since we have decided that petitioner's liability was the secondary liability of a guarantor of a specific account,

Decision will be entered for respondent.

Entered Aug. 2, 1948.

[117]

The Tax Court of the United States
Washington
Docket No. 12834

JOE BALESTRIERI & CO.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, entered August 2, 1948, it is

Ordered and Decided: That there is a deficiency in excess profits tax of \$25,021.71 for the year 1943.

Entered Aug. 3, 1948.

(Seal) /s/ O. P. LeMIRE,

Judge.

[118]

[Title of Tax Court and Cause.]

ALTERNATIVE MOTION FOR REHEARING
To the Honorable Tax Court of the United States:

Now comes the petitioner above-named and respectfully moves the Court, in the event that its decision in the above-entitled matter entered on August 3, 1948 is permitted to stand, to grant a rehearing in said matter, to be held on the next San Francisco calendar of the Tax Court of the United States.

For cause:

1. In the Findings of Fact and Opinion promulgated on August 2, 1948, the Court on the basis

of an assumed inconsistency, which does not in fact exist, and on the further basis that the unimpeached and uncontradicted testimony of petitioner's principal witness was highly self-serving, found the essential facts to be contrary to petitioner's [128] allegations. It is respectfully submitted that, if under these circumstances, the Court does not so amend its Findings of Fact and Opinion to find in favor of the petitioner, vacate its decision and enter one in accordance with the petitioner's prayer for relief, a rehearing should be granted at which petitioner will be given an opportunity to further support said testimony, and the respondent given an opportunity to controvert the same.

2. It is believed that this Motion is particularly meritorious under the circumstances, in that petitioner believed its former counsel to be qualified to present the matter to the Tax Court, but only discovered on the eve of the hearing that said counsel was not permitted to practice, and thereupon immediately obtained substitute counsel so admitted, but such substitute counsel were not granted time to prepare for the hearing with the consequence that evidence available but not known to such counsel at such time was not presented.

Respectfully submitted,

/s/ LOUIS JANIN,

/s/ HAROLD E. HAVEN,

Counsel for Petitioner.

Dated August 26, 1948.

Denied, Sept. 7, 1948.

/s/ JOHN W. KERN,

Judge.

[Endorsed]: T.C.U.S. Filed Aug. 30, 1948. [129]

In the United States Court of Appeals
For the Ninth Circuit.

Tax Court Docket No. 12834

JOE BALESTRIERI & CO.,

Petitioner for Review,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent for Review.

PETITION FOR REVIEW

Joe Balestrieri and Co., a corporation with its principal place of business at San Francisco, California, hereinafter referred to as the Petitioner, by its counsel, Louis Janin, Harold E. Haven and William B. Acton, hereby petitions the United States Circuit Court of Appeals for the Ninth Circuit to review the decision entered by the Tax Court of the United States on August 3, 1948, pursuant to its Memorandum Findings of Fact and Opinion entered August 2, 1948, determining a deficiency in excess profits tax in the amount of \$25,021.71 for the year 1943.

This petition for review is filed pursuant to the provisions of Sections 1141 and 1142, I.R.C. as amended. [130]

Petitioner filed its income and excess profits tax returns for the year 1943, with the Collector of Internal Revenue for the First District of California, at San Francisco, California, which is located within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit.

This is a proceeding for review by the United States Circuit Court of Appeals for the Ninth Circuit of a decision by the Tax Court of the United States entered August 3, 1948, wherein it is determined that petitioner is liable for a deficiency in excess profits tax of \$25,021.71.

On August 30, 1948, petitioner filed with The Tax Court in the above entitled proceeding, the following motions, to wit: Motion for Correction and Enlargement of Findings of Fact and Opinion, Motion to Vacate Decision, Motion for Reconsideration, and Alternative Motion for Rehearing. All of said motions were denied on September 7, 1948.

The petition for review involves the question whether the Tax Court erred in holding that petitioner was not entitled to a loss deduction in the year 1943 in the sum of \$22,229.37, and the further questions of whether The Tax Court erred in failing to find certain facts and in its rulings on certain motions. [131]

NATURE OF THE CONTROVERSY

The nature of the controversy is as follows:

Issue I

In its income and excess profits tax returns for the year 1943, petitioner deducted as a loss the sum of \$22,229.37. The Commissioner of Internal Revenue disallowed the deduction.

As stated by The Tax Court in its opinion the propriety of the deduction turns upon whether the effect of the transactions detailed in its findings of fact was to make the petitioner a guarantor of

the liabilities of a certain partnership to the Pacific Vegetable Oil Corporation (hereinafter called P. V.O.) with the secondary liability incident to a guarantee or to make petitioner primarily liable to pay the losses suffered by the partnership in certain transactions financed by P.V.O.

A brief summary of the findings of The Tax Court pertinent to the above issue is as follows:

The partnership, Strategic Mineral Exploration Co., proposed to engage in a chrome milling venture and by letter proposed to P.V.O. that it finance the transactions of such venture for a percentage of the profits.

P.V.O. indicated it would agree to the proposal provided petitioner would agree to underwrite any loss which P.V.O. might sustain as a result of its discounting any invoices of the partnership. [132]

The partnership thereupon offered petitioner by letter one-half of its profits in consideration of petitioner agreeing to guarantee the payment of any losses or deficits that might occur on the money borrowed from P.V.O. on the chrome milling venture.

After the approval of the partnership's proposal by the petitioner's board of directors, the petitioner wrote the partnership accepting the proposal.

Before the end of the year 1943 the partnership ceased operations and petitioner executed its note to P.V.O. in payment of the losses of the chrome milling venture.

Petitioner contended before The Tax Court that the exchange of letters between petitioner and the

partnership created a contract between them by which petitioner guaranteed (insured) the partnership against losses in its chrome milling venture financed by P.V.O.

That the agreement between the petitioner and the partnership was for the mutual benefit of petitioner and the partnership and only incidentally for the benefit of P.V.O., and that such contract in effect made petitioner and the partnership joint venturers.

The Tax Court failed and refused to follow the testimony of petitioner's witnesses supporting the foregoing contention, which testimony was unimpeached and uncontradicted, on the mistaken assumption that it was inconsistent [133] with the known facts, and upon the assumption (mistaken as to petitioner's principal witness, W. E. Otto) that it was highly self-serving.

Issue II

Petitioner employed J. L. Flynn, an attorney, to represent it before The Tax Court. Mr. Flynn signed the petition and answered for petitioner on the call of the calendar on March 20, 1948, when the case was set for hearing on March 25, 1948, at 2:00 p.m. In the afternoon of March 24, 1948, William B. Acton, general counsel for petitioner, but not admitted to the Tax Court was advised that Mr. Flynn likewise was not admitted to The Tax Court, and that no person admitted to that Court was prepared to try the case. Mr. Acton advised petitioner to employ Louis Janin and Harold E. Haven, attorneys admitted to The Tax

Court, which employment was accomplished on the morning of March 25, 1948. Mr. Haven, who was representing a taxpayer in the case set for 10:00 a.m. on March 25, 1948, at the opening of Court on that morning filed petitioner's substitution of attorneys, explained the facts to the Court and moved for a continuance of the hearing for sufficient time to permit his partner, Mr. Janin, to prepare petitioner's case for trial.

The motion was denied. [134]

Issue III

On August 30, 1948, petitioner filed with The Tax Court a Motion for Rehearing in order that it might introduce further testimony to amplify and support testimony which The Tax Court had stated in its opinion it was disregarding because such testimony was self-serving and inconsistent with other facts in the record. One of the grounds of said motion was that counsel for petitioner had not been allowed by the Court sufficient time to prepare petitioner's case in the first instance.

The Tax Court, pursuant to its memorandum findings of fact and opinion promulgated August 2, 1948, having on August 3, 1948, entered its decision that there is a deficiency due from petitioner in excess profits tax of \$25,021.71 for the year 1943, and the petitioner having exhausted its remedies before such Court, the petitioner seeks appropriate relief by this petition for review.

ASSIGNMENT OF ERRORS

Petitioner assigns the following errors:

1. The Tax Court erred in failing to determine

as an ultimate fact from the letters exchanged between the partnership and petitioner, the party with whom petitioner contracted. [135]

2. The Tax Court erred in deciding that petitioner was only secondarily liable on the so-called contract of guaranty created by the exchange of letters between the partnership and petitioner.

3. The Tax Court erred in deciding that petitioner did not suffer a deductible loss of \$22,229.37 in the year 1943, the loss sustained on the chrome milling venture.

4. The Tax Court erred in failing to find that the partnership was engaged in a chrome mining venture and a chrome milling venture.

5. The Tax Court erred in failing and refusing to follow the unimpeached and uncontradicted testimony of W. E. Otto on the unsupported assumption that such testimony was highly self-serving and was inconsistent with the known facts.

6. The Tax Court abused its discretion by failing to grant the motion of petitioner for a continuance for sufficient time to permit qualified trial counsel, just employed, to prepare for trial.

7. The Tax Court abused its discretion by failing to grant the motion of petitioner for a rehearing in view of the Court's comments as to the inadequacy of the evidence and in view of the court's refusal to grant qualified trial counsel time to prepare petitioner's case for trial. [136]

8. The Tax Court erred in that its decision is not in accordance with law.

Wherefore, petitioner prays:

That the decision of The Tax Court of the United States in this case be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit;

That a transcript of the entire record be prepared in accordance with the law and the rules of said Court and transmitted to the Clerk of said Court for filing;

That said Court reverse the decision of The Tax Court of the United States and direct the latter Court to modify its findings of fact, opinion, and judgment to permit the deduction of the loss of \$22,229.37 sustained by petitioner in the year 1943; and

For such other and further relief as to the Court may appear just and proper in the premises.

/s/ LOUIS JANIN,
/s/ HAROLD E. HAVEN,
/s/ WILLIAM B. ACTON,
Counsel for Petitioner.

(Duly Verified.)

[Endorsed]: T.C.U.S. Filed Nov. 1, 1948. [137]

[Title of U. S. Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To the Commissioner of Internal Revenue, and to Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, Internal Revenue Building, Washington, D. C.

You are hereby notified that the petitioner, on November 1st, 1948, filed with the Clerk of the

Tax Court of the United States, in Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Tax Court of the United States heretofore rendered in the above entitled cause. A copy of the petition for review is hereto attached and served upon you.

Dated this 1st day of November, 1948.

/s/ LOUIS JANIN,
/s/ HAROLD E. HAVEN,
/s/ WILLIAM B. ACTON,
Counsel for Petitioner.

(Acknowledgment of Service.)

[Endorsed]: T.C.U.S. Filed Nov. 2, 1948. [139]

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON REVIEW

Joe Balestrieri and Co., petitioner for review, through its attorneys, Louis Janin, Harold E. Haven and William B. Acton, hereby designates the portions of the record and the evidence to be included in the record on review in the above entitled proceedings, as follows:

The entire record, excluding, as duplication, Exhibit A to the amended petition, excluding formal headings, and excluding (because included in the memorandum findings of fact and opinion) petitioner's Exhibits 1, 2, 3 and 5.

You are hereby respectfully requested to prepare and certify the record on review in accordance with the foregoing designation and in accordance with law and the rules of the United States Circuit Court of Appeals for the Ninth [140] Circuit, and to transmit the same to the Clerk of said Court for filing.

Dated November 3, 1948.

/s/ LOUIS JANIN,
/s/ HAROLD E. HAVEN,
/s/ WILLIAM B. ACTON,
Counsel for Petitioner.

(Acknowledgment of Service.)

[Endorsed]: T.C.U.S. Filed Nov. 5, 1948. [141]

The Tax Court of the United States
Washington

[Title of Cause.]

CERTIFICATE

I, Victor S. Mersch, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 141, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 26th day of November, 1948.

(Seal) /s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the United States.

[Endorsed]: No. 12102. United States Court of Appeals for the Ninth Circuit. Joe Balestrieri and Company, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed November 29, 1948.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

The United States Court of Appeals
For the Ninth Circuit.

No. 12102

JOE BALESTRIERI & CO.,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

DESIGNATION OF CONTENTS OF RECORD
TO BE PRINTED AND STATEMENT OF
POINTS INTENDED TO BE RELIED
UPON

Now comes the petitioner on review by and through its counsel, Louis Janin, Harold E. Haven, and William B. Acton, and designates the following material as being pertinent to the issues presented upon this review and to be included in the printed transcript, together with the pages in the typewritten transcript certified from the Tax Court of the United States, as follows:

Docket Entries. Amended Petition. Answer to Amended Petition. Transcript of Testimony. Petitioner's Exhibit 4. Respondent's Exhibits A and B. Memorandum Findings of Fact and Opinion. Decision. Alternative Motion for Rehearing—Denied. Petition for Review and Proof of Service. Designation of Contents of Record on Review and Proof of Service Thereon. This Designation and Statement.

Petitioner intends to rely upon the assignments of error set forth in its petition for review and particularly upon the following points as supporting this petition for review:

1. The Tax Court committed error of law when contrary to the unimpeached and uncontradicted and not inherently improbable testimony of petitioner's principal witness, and upon the basis of assumed facts not true, it determined without evidentiary support that the agreement between petitioner and Strategic Minerals Exploration Co., a co-partnership, was one purely of guarantee between petitioner and Pacific Vegetable Oil Corporation.

2. The Tax Court's determination that petitioner did not sustain a deductible loss of \$22,-229.37 in 1943 as the result of its participation in a joint venture with Strategic Minerals Exploration Co. is contrary to the evidence.

3. The Tax Court abused its discretion when it failed to grant petitioner's oral motion to give newly substituted counsel replacing counsel not admitted to practice before the Tax Court, at least two or three days to prepare the proceeding for trial.

4. By reason of the foregoing circumstances and also by reason of the Tax Court's own comments upon the inadequacy of the evidence, the Tax

Court abused its discretion in refusing to grant petitioner a rehearing.

Dated December 7, 1948.

Respectfully submitted,

/s/ LOUIS JANIN,

/s/ HAROLD E. HAVEN,

/s/ WILLIAM B. ACTON,

Counsel for Petitioner

On Review.

[Endorsed]: Filed December 7, 1948. Paul P. O'Brien, Clerk.

No. 12,102

IN THE
United States Court of Appeals
For the Ninth Circuit

JOE BALESTRIERI AND COMPANY,
Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

OPENING BRIEF OF PETITIONER.

LOUIS JANIN,
HAROLD E. HAVEN,
WILLIAM B. ACTON,
1104 Mills Tower, San Francisco 4, California,
Counsel for Petitioner.

FILED

APR -1 1949

PAUL P. O'BRIEN,
CLERK

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No. 12,102

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JOE BALESTRIERI AND COMPANY,	}
<i>Petitioner,</i>	
vs.	
COMMISSIONER OF INTERNAL REVENUE,	}
<i>Respondent.</i>	

OPENING BRIEF OF PETITIONER.

I.

JURISDICTIONAL STATEMENT.

The petitioner herein, pursuant to Sections 1141 and 1142, I.R.C. petitioned this Court (Tr. 86) on November 1, 1948, to review a decision of the Tax Court of the United States (Tr. 69) entered on August 3, 1948, which determined a deficiency in petitioner's excess profits tax of \$25,021.71 for the year 1943. The petitioner's tax return (Tr. 58) was filed with the Collector of Internal Revenue for the First District of California. A notice of deficiency was mailed to petitioner on October 8, 1946 (Tr. 5), and the petition therefrom filed with the Tax Court on January 6,

1947. (Tr. 1.) A hearing was had on the merits on March 25, 1948. The Tax Court entered its memorandum opinion (Tr. 69) on August 2, 1948.

II.

CONCISE STATEMENT OF CASE.

Issue 1.

(a) Condensed statement of ultimate facts and issues.

This controversy involves the question of whether petitioner is entitled to a deduction of \$22,229.37 in its excess profits tax return for the year 1943.

On July 26, 1943, petitioner agreed with a party about to borrow money to finance a specified venture (hereinafter referred to as the debtor) that petitioner, in consideration of 50% of the profits of the venture, would guarantee such debtor against "the payment of any losses or deficits that may occur on money borrowed" from a specified creditor in connection with such venture. (Tr. 75-78.)

The venture was undertaken and failed. Petitioner in November, 1943, issued its note to the creditor for \$22,229.37 (Tr. 9) being the amount due the creditor after the termination of the venture. (Tr. 79.)

Petitioner deducted the foregoing sum as a loss in its 1943 excess profits tax return. The deduction was disallowed by the Commissioner of Internal Revenue. The Tax Court sustained the Commissioner on the ground that under the agreement stated above peti-

tioner was a guarantor, that petitioner as a guarantor was entitled to recoup any amount paid to the creditor from the debtor, that petitioner had to prove both payment to the creditor and the worthlessness of the debtor's obligation to petitioner within the taxable year before it was entitled to deduct the foregoing sum; and that petitioner had failed to prove both payment and worthlessness.

Petitioner contended before the Tax Court, and now contends, that a contract of guaranty arises only when a third party contracts with a creditor to answer for the debt, default or miscarriage of a debtor and that as the contract herein was between the debtor and petitioner it was not a contract of guaranty nor was petitioner a guarantor.

Petitioner further contended before the Tax Court and now contends that as the substance of the contract between the debtor and petitioner was that petitioner, in consideration of 50% of the profits of the venture, would be liable for certain specified losses of the venture, the debtor and petitioner were joint venturers and that the aforesaid \$22,229.37 was petitioner's share of the loss of the joint venture, which loss occurred in the taxable year herein involved.

(b) Specific pertinent facts.

The pertinent facts hereafter stated are taken from the Tax Court's findings of fact unless otherwise noted.

“Petitioner is a corporation organized in 1941 under the laws of the State of California. Its

business is that of a wholesale dealer in fish. Its corporation income and declared value excess profits tax and corporation excess profits tax returns for the year 1943 were filed, on a cash basis, with the collector of internal revenue for the first district of California." (Tr. 69.)

"Petitioner's capital stock was entirely owned by Joe Balestrieri and W. E. Otto, or by members of their immediate family, Balestrieri was president of petitioner and Otto was vice-president. Both were members of petitioner's Board of Directors." (Tr. 70.)

"In the early summer of 1943, one J. M. Hoff, a mining engineer, approached Otto, in his individual capacity, with a proposition for the mining and milling of chrome ore. Thereafter, Otto introduced Hoff to Balestrieri. In July, 1943, after several conversations and after each had convinced himself that very large profits would be derived from the mining and milling of this ore, the three individuals named (Hoff as party of the first part, Balestrieri as party of the second part, and Otto as party of the third part) executed Articles of Co-partnership, which are incorporated herein by reference, and which provide, in substance, as follows: Each party would have an equal interest in the partnership, which would operate under the name of Strategic Mineral Exploration Co." (hereinafter called Strategic Mineral). (Tr. 70.)

"The profits were to be shared equally between the partners after reimbursing Balestrieri and Otto for any sums advanced." (Tr. 71.)

The uncontradicted testimony of Otto shows that Strategic Mineral treated the mining of chrome ore and the milling of chrome ore as two separate ventures, and that he approached Pacific Vegetable Oil Corporation hereinafter called P.V.O., regarding the financing of only the milling venture. (Tr. 27.) After a conference with one of the officers of P.V.O., Otto on behalf of Strategic Mineral wrote P.V.O. a letter (Tr. 71-72) which may be summarized as follows, and which was headed "Financing chrome ore through plant of the Montrose Mine & Milling Company". The letter opens:

"This is to confirm conversation wherein you agreed to finance the purchase of Chrome ore and milling and the discounting of the invoices upon the following basis:"

The letter then outlined the payments to be made for the purchase of chrome ore, the cost of milling the same, and the cost of shipping the chrome concentrates to the Metal Reserve stock pile at Sacramento. The letter then outlines the manner in which the invoices for the chrome concentrates would be assigned to P.V.O., and then provides that P.V.O. shall deduct from the amounts collected on the invoices, the costs advanced, and gave instructions as to how the remaining balance of the invoices representing profits should be divided and specifies the share that P.V.O. shall retain of such profits.

P.V.O. "indicated that it would agree to the proposition outlined by Otto, provided petitioner's Board of Directors would agree to underwrite

any loss which" P.V.O. "might sustain as a result of its discounting any invoices of the partnership." (Tr. 75.)

Thereupon Otto, on behalf of Strategic Mineral wrote to petitioner the following letter (Tr. 75-76):

"July 24, 1943

Joe Balestrieri & Co.
432 Clay Street
San Francisco, California
Gentlemen:

Offer to participate in profits of Chrome Milling Operation to be handled by this partnership in consideration of guaranteeing venture.

With reference to letter written by Otto Sales Company to the Pacific Vegetable Oil Corp. dated July 23, 1943, which was written in behalf of Strategic Mineral Exploration Company, we hereby offer you a one-half participation in any profits that the Strategic Mineral Exploration Company may earn. All as outlined in letter attached hereto.

The consideration for this offer is that your corporation agrees to guarantee the payment of any losses or deficits that may occur on the money borrowed from the Pacific Vegetable Oil Corporation on our chrome milling venture.

In the event that you decide to participate in this venture, please have your Board of Directors ratify same and formally confirm same to us in writing.

Yours very truly,
Strategic Mineral Exploration Co.
/s/ W. E. Otto"

WEO;b

On July 26, 1943, petitioner's board of directors met and accepted said offer (Tr. 76-77), and on the same day petitioner by its president, Joe Balestrieri wrote a letter to Strategic Mineral accepting the offer made by its letter of July 24, 1943.

"Petitioner's Board of Directors having taken this action, the P.V.O. consented to and did discount invoices of the Strategic Mineral in accordance with its proposal outlined in the letter of July 23, 1943." (Tr. 78.)

"Before the end of the year 1943, Strategic Mineral had lost approximately \$39,000. The partners decided to cease operations and to liquidate Strategic Mineral. Considerable bitterness developed between Balestrieri and Otto on the one hand and Hoff on the other. Hoff refused to assume any responsibility for the losses of the Strategic Mineral and 'walked out' on Balestrieri and Otto." (Tr. 78-79.)

"There was due to" P.V.O., "on account of its financial dealings with" Strategic Mineral, "the sum of \$22,229.37. In 1943, Petitioner executed its note in that amount to" P.V.O., "but payments thereon were not made by petitioner until the following year. The other unpaid bills of the partnership, in the approximate sum of \$17,000, were paid gradually by Balestrieri and Otto."

Otto testified that the losses in the approximate sum of \$17,000 resulted from the mining venture of Strategic Mineral. (Tr. 27.)

Issue 2.

Petitioner employed J. L. Flynn, an attorney, to represent it before the Tax Court. Mr. Flynn signed the petition and answered for petitioner on the call of the setting calendar on March 22, 1948, when the case was set for hearing on March 25, 1948, at 2:00 p.m. In the afternoon of March 24, 1948, William B. Acton, general counsel for petitioner, but not admitted to the Tax Court was advised that Mr. Flynn likewise was not admitted to the Tax Court, and that no person admitted to that Court was prepared to try the case. Mr. Acton advised petitioner to employ Louis Janin and Harold E. Haven, attorneys admitted to the Tax Court, which employment was accomplished on the morning of March 25, 1948. Mr. Haven, who was representing a taxpayer in the case set for 10:00 a.m. on March 25, 1948, at 12:05 p.m. of that day filed petitioner's substitution of attorneys, explained the facts to the Court, and moved for a continuance of the hearing for sufficient time to permit his partner, Mr. Janin, to prepare petitioner's case for trial.

The motion was denied. (Tr. 11-13.)

III.**SPECIFICATION OF ERRORS.**

The Tax Court, petitioner believes, made the following errors:

1. The Tax Court erred in holding and determining that the agreement between Joe Balestrieri and Com-

pany (petitioner) and Strategic Mineral Exploration Co. (debtor) was a contract of guaranty by petitioner to Pacific Vegetable Oil Corporation (creditor).

2. The Tax Court erred in failing and refusing to hold and determine that the agreement between petitioner and Strategic Mineral Exploration Co. constituted an agreement of joint venture.

3. The Tax Court erred in deciding that petitioner did not suffer a deductible loss of \$22,229.37 in the year 1943, the same being petitioner's distributive share of the loss of the joint venture.

4. The Tax Court erred in failing to find that the Strategic Mineral Exploration Co. was engaged in a chrome mining venture and a chrome milling venture.

5. The Tax Court erred in failing and refusing to follow the unimpeached and uncontradicted testimony of W. E. Otto on the unsupported assumption that such testimony was highly self-serving and was inconsistent with the known facts.

6. The Tax Court abused its discretion by failing to grant the motion of petitioner for a continuance for sufficient time to permit qualified trial counsel, just employed, to prepare for trial.

7. The Tax Court abused its discretion by failing to grant the motion of petitioner for a rehearing in view of the Court's comments as to the inadequacy of the evidence and in view of the Court's refusal to grant qualified trial counsel time to prepare petitioner's case for trial.

8. The Tax Court erred in that its decision is not in accordance with law.

IV.

ARGUMENT.

SUMMARY.

Issue 1.

(a) Petitioner was not a guarantor but on the contrary was primarily liable to P.V.O.

(b) The exchange of letters between petitioner and Strategic Mineral created a joint venture.

(c) Petitioner's distributive share of the loss of the joint venture was \$22,229.37, which was a deductible loss sustained by petitioner in the year 1943.

Issue 2.

The Tax Court abused its discretion in refusing to grant substituted counsel time within which to prepare petitioner's case.

ISSUE 1.

(a) Petitioner was not a guarantor but on the contrary was primarily liable to P.V.O.

The Tax Court concluded that the contract made by the interchange of letters between petitioner and Strategic Mineral was a contract of guaranty under which petitioner had only the secondary liability of a guarantor, and the debtor had the primary liability.

The Tax Court further held that Strategic Mineral was obligated to reimburse petitioner for any payments it made to P.V.O. under the terms of the contract. In reaching this conclusion the Tax Court failed to consider to whom the promise of so-called "guarantee" was made. Petitioner's promise was to Strategic Mineral and was to pay "any losses or deficits that may occur on the money borrowed from" P.V.O. "on our chrome milling venture" (Tr. 76). Strategic Mineral in the contemplated transaction was to be the debtor and P.V.O. the creditor.

The fact that the so-called contract of guaranty was between petitioner and Strategic Mineral, the debtor, is the pivotal fact of this case. The Tax Court in its decision entirely overlooked this fact and was misled by the use of the word "guarantee" which does not always indicate a contract of guaranty.

"The use of the words 'guaranty' or 'guarantee' do not always denote that there is a contract of guaranty. These words are often used, both by courts and by parties, as synonymous with such words as warranty, agree, indemnify, covenant, surety, and when the intent is to denote an original obligation."

13 *Cal. Jur.* 85-86, Guaranty, Sec. 3.

"The authorities recognize that the word 'guarantee' is frequently employed in business transactions to describe, not the securing of a debt, but an intention to be bound by a primary and independent obligation."

24 *Am. Jur.* 876, Guaranty, Section 5.

“The use of the word ‘guaranty’ or ‘guarantee’ does not necessarily import a guaranty contract, for these words are often used in the sense of a promise or agreement importing an original obligation on the part of a person executing such contract.”

38 *C.J.S.* 1131, Guaranty, Section 2.

A contract of guaranty, being one to answer for the debt, default or miscarriage of another, is within the statute of frauds and must be in writing.

Civil Code of California, Section 2793;

13 *Cal. Jur.* 104, Guaranty, Section 18;

24 *Am. Jur.* 899, Guaranty, Section 38;

38 *C.J.S.* 1156, Guaranty, Section 18.

The clearest authority that a promise by a third party to a debtor to pay his creditor is not a contract of guaranty will be found in the consideration of whether oral promises of this nature come within the statute of frauds.

The best exposition of the subject is in 49 *Am. Jur.* 438-39, Statute of Frauds, Section 82, wherein it is said:

“Sec. 82. A promise by one person, although he is in no way liable for an existing debt, made to the debtor for an adequate consideration, to discharge the debt, is not regarded as a promise to answer for the debt of another within the meaning of the statute of frauds. Such rule has been attributed to the principle that the statute applies only to promises made to a person to whom another is answerable, but a more fundamental

reason for the rule is that the promisor, under the circumstances stated, makes the debt his own and becomes the principal debtor.

The accepted view is that the fact that the liability of the debtor still continues does not bring the transaction within the operation of the statute, since in such case, although the liability of the debtor continues, he is liable rather as surety than as principal, the new promisor becoming in effect the principal debtor."

In Volume 2 of the revised edition of *Williston on Contracts*, after stating in section 452, page 1314:

"It is of assistance in the construction of the next provision of the Statute to have in mind the probable purpose of the legislature in providing that promises to answer for the debt of another must be in writing. Why should such promises, more than others, be subject to the requirement? Doubtless because the promisor has received no benefit from the transaction. This circumstance may make perjury more likely, because while in the case of one who has received something the circumstances themselves which are capable of proof show probable liability, in the case of a guaranty nothing but the promise is of evidentiary value. Moreover, as the lack of any benefit received by the guarantor increases the hardship of his being called upon to pay, it also increases the importance of being sure that he is justly charged."

it is stated in Sec. 460, p. 1331:

"Though the words of the Statute" (of Frauds) "are in terms applicable to a promise

made to anyone to pay a debt of a third person, by construction of the Courts which have had in mind the mischief aimed at, the application of the Act has been confined to promises made to the creditor himself. Accordingly, oral promises made to the debtor to assume and pay his debt may be enforced by him, as may an oral promise to lend him money with which to discharge his debts.”

In 37 *C.J.S.* 526, it is said:

“An oral promise to discharge the debt of another, if made to the debtor himself is not within the statute of frauds.”

In *Page on Contracts*, Section 1234, Vol. 2, page 2156, it is said:

“To be included in this clause of the statute, the promise must be to answer for the debt of ‘another’. A promise by A to B to pay B’s debt is not a promise to pay the debt of ‘another’ within the meaning of the statute, even though the ultimate effect of performance by A will be to discharge a debt owing from B to another.”

In *Garroway v. Jennings*, 189 Cal. 97, an action against Davis and Jennings for attorney’s fees, wherein Davis, in consideration of the assignment of a judgment, promised Jennings to pay the attorney fees which she owed her attorneys for securing said judgment, the Court said:

“The sole ground of demurrer is that the complaint seeks to charge Davis with the debt of Jennings upon an undertaking not in writing.

The basis of this objection is that the contract alleged against Davis was a contract of suretyship or guaranty which is invalid unless made in writing and signed by the party to be charged. This principle does not apply to a contract of the character alleged in the complaint. *It was not a contract to guarantee or become surety* for the obligation of Jennings, but was an original obligation on his part to pay the debt of Mrs. Jennings directly to her creditors and it was based upon a sufficient consideration, that is, the transfer to him by her of the judgment above mentioned. It comes within the description of such original obligations set forth in Section 2794 of the Civil Code, and it need not be in writing.” (Emphasis added.)

We will not further elaborate on this issue by citing the many cases supporting the texts quoted. In fact, we would not have argued this point so extensively, if it were not for the fact that what seemed obvious to us, was not obvious to the Tax Court.

We feel certain that the foregoing authorities are ample to establish that the agreement between petitioner and Strategic Mineral was not a contract of guarantee but one in which petitioner was the only party primarily liable for the repayment of any loss of money advanced by P.V.O. to finance the milling venture. Petitioner was in substance, the real borrower of the money.

Furthermore, the testimony of petitioner’s witnesses show that it was the intention of both petitioner and Strategic Mineral that petitioner become the primary

obligor (see testimony W. E. Otto Tr. 27-30, 37-38 and Joseph Balestrieri Tr. 47, 50-51).

The misinterpretation of the contract between petitioner and Strategic Mineral makes the entire decision of the Tax Court erroneous, both as to statement of general legal principles and as to the application of the law to the facts. Such error requires a reversal of the decision of the Tax Court and the proper application of the law by the Court of Appeals for the Ninth Circuit to the facts found by the Tax Court. The balance of the argument on this issue is devoted to the discussion of the true legal significance of the facts so found.

(b) The exchange of letters between petitioner and Strategic Mineral created a joint venture.

The pertinent facts to be considered in determining the legal relationship of the parties are:

1. Strategic Mineral had a proposition for the mining and milling of chrome ore out of which they expected to make very large profits (Tr. 70). The proposition had two features, one was the mining of the chrome ore and the other was the milling of the chrome ore. (Tr. 27.)

2. The milling part of the proposition contemplated the purchase of chrome ore, the milling of the same and the shipment of the chrome concentrates to the Metals Reserve stockpile at Sacramento, California. (Tr. 72.)

3. To finance the milling venture Strategic Mineral proposed to P.V.O. that it advance the money

necessary to finance the purchase, milling and shipment of the chrome ore, P.V.O. to be protected by the assignment of the invoices for the chrome concentrates shipped and to receive certain percentages of the profits of the milling venture. (Tr. 71-74.)

4. P.V.O. agreed to finance the milling venture provided petitioner would agree to "underwrite" any loss which it might sustain as a result of its discounting any invoices of the milling venture. (Tr. 75.)

5. Thereupon Strategic Mineral by letter offered petitioner a one-half participation in any profits Strategic Mineral may earn in the milling venture, in consideration that petitioner "agrees to guarantee the payment of any losses or deficits that may occur on the money borrowed from" P.V.O. "on our chrome milling venture." Petitioner accepted this offer by letter after such course of action was approved by its Board of Directors. (Tr. 75-78.)

6. W. E. Otto and J. Balestrieri were two of the three partners of Strategic Mineral (Tr. 72) and petitioner's capital stock was entirely owned by them or by members of their immediate families. Balestrieri was president of petitioner and Otto, vice-president. (Tr. 70.)

In the preceding subdivision of this argument we have already established that the contract formed by the interchange of letters between petitioner and Strategic Mineral made petitioner primarily liable for the payment to P.V.O. of any moneys advanced which were not recovered from the discounted invoices.

P.V.O. could have sued petitioner directly upon its contract with Strategic Mineral because in California, as in most states, a third party may sue upon a contract made for its benefit. Section 1559 of the Civil Code of California provides:

“A contract made expressly for the benefit of a third party, may be enforced by him at any time before the parties thereto rescind it.”

By virtue of this provision of the Civil Code of California, the agreement between petitioner and Strategic Mineral did in fact underwrite the advance of P.V.O. in a manner which must have been more satisfactory to P.V.O. than if petitioner had guaranteed the account of Strategic Mineral. This, because petitioner was primarily liable to P.V.O. instead of secondarily liable. When it is considered that it has been stipulated that P.V.O. made the advances that it did, only because it was protected by the foregoing so-called “guarantee” contract of petitioner (Tr. 23) it becomes apparent that petitioner and not Strategic Mineral was the real borrower of the money from P.V.O. which was lost in the milling venture.

This being so, what relationship was created between petitioner and Strategic Mineral by the contract formed by their exchange of letters? There seems to be but one logical answer to this question and that is that they were joint adventurers.

As stated in 14 *Cal. Juris.*, 760:

“A joint adventure may be defined to be a joint association of persons in a common enterprise

for profit, but falling short of a partnership * * *."

The essence of the agreement between petitioner and Strategic Mineral was that petitioner, as its contribution to the joint venture, would supply the necessary finances through borrowing and that Strategic Mineral as its contribution would supply the milling venture from which great profits were expected, and manage the same. Each was to receive 50% of the profits and if there was a loss each was to lose the contribution, each had made. What is this if it is not a joint venture?

The money to be borrowed from P.V.O. was to be payable to Strategic Mineral because the venture was to be operated in its name. However, when we consider that W. E. Otto and J. Balestrieri were not only the officers of petitioner but also its stockholders and that said Otto and Balestrieri were two of the three partners of Strategic Mineral, it must be held that the management and control of the venture was as much in the hands of petitioner as it was in the hands of Strategic Mineral.

Every element of a joint venture is present. The parties share the profits and risk their contributions to the venture. Furthermore, there is a common control of the management of the venture.

In *Butler v. Union Trust Co.*, 178 Cal. 195; 172 Pac. 601, it was held that a joint venture exists where a furrier agrees with a merchant to devote his labor and skill in the manufacture of fur garments, the

merchant to furnish the capital, pay the furrier a salary, and the two to divide the remaining profits.

In *Champagne v. Passons*, 95 Cal. App. 15, 27; 272 Pac. 353, it was held that an oral agreement that defendant should furnish the money necessary to buy certain land and the equipment necessary to develop it and that plaintiff should devote his time for three years to the development of the land in accordance with defendant's directions, the parties to divide the profits and defendant to lose his investment and plaintiff his time in case the land was washed away by floods, was held to be an agreement of joint adventure and plaintiff was held to be entitled to an accounting of profits.

As far as tax law is concerned, the decisions are not any too definitive, for the most part, and this is particularly due to the fact that joint ventures were not included in the definition of partnership prior to the Revenue Act of 1932. What is probably the leading appellate tax case is *Tompkins v. Commissioner*, (C.C.A. 4, 1938) 97 Fed. (2d) 396.

In the *Tompkins* case a partnership and a corporation together purchased an office building, subject to a deed of trust, the partnership to have a $\frac{3}{5}$ ths interest. The corporation incurred financial difficulties and was unable to pay its pro rata of costs and expenses. The partnership acquired the property on foreclosure sale, and the Commissioner and Board of Tax Appeals held that it sustained no loss. The Circuit Court, however, held that the joint venturer

had sustained a loss, and the partnership was entitled to the deduction claimed.

See also:

James F. Curtis, 3 T.C. 648, 661;

Roland L. Taylor, 44 B.T.A. 370.

The fact that losses are to be shared in a different manner than profits is of no importance and does not militate against the existence of a joint venture or partnership.

Thompson & Black, 11 B.T.A. 729.

In this case as to one partnership undertaking, one of the partners agreed to stand all losses, but both partners were to participate in any profits. It was held that the loss was a partnership loss, even though it would be entirely utilized in reducing the distributive share of the income of the one partner.

A similar result is fairly common where under a partnership agreement one or more of the partners is to be paid a salary which is to be treated as an operating expense and not as an advancement, and where such "salaries" exceed net income and result in a depletion of the capital of the partners. Under such circumstances the partners are allowed to deduct the loss represented by the depletion of their capital.

Augustine M. Lloyd, 15 B.T.A. 82, 85.

The case of *Kenneth Walsh*, 38 B.T.A. 368, 377, is particularly pertinent, although it illustrates the negative side of the problem. In this case the taxpayer claimed that a loss had been sustained by a partner-

ship of which he was a member and that he was entitled to deduct the same pro rata of that loss as was his pro rata interest in the profits. However, under the partnership agreement, this loss was solely that of partners other than the taxpayer. The Board of Tax Appeals held that the loss was not his, and his claim for deduction there denied.

See also:

Charles C. Hood, 19 B.T.A. 962, 965;

Lederer v. Parrish, 16 Fed. (2d) 928; (C.C.A. 3, 1927, rev'g *Parrish v. Lederer*, 14 Fed. (2d) 987).

We believe that the foregoing authorities clearly establish that petitioner and Strategic Mineral were joint adventurers.

(c) **Petitioner's share of the loss of the joint venture was \$22,229.37, which loss was sustained in the year 1943 and was deductible in that year.**

The Tax Court having misinterpreted the contract between Strategic Mineral and petitioner, failed to find as to the foregoing joint venture in milling chrome and also failed to find that Strategic Mineral was separately interested in a chrome mining venture. It did, however, find that before the end of 1943 Strategic Mineral had lost approximately \$39,000; that it ceased operations and was liquidated; that there was due P.V.O. \$22,229.37; that petitioner gave its note in 1943 to P.V.O. for that amount; and that the other unpaid bills of Strategic Mineral in the approximate sum of \$17,000 were paid by Otto and

Balestrieri as partners in Strategic Mineral. (Tr. 78-79.)

The Tax Court having found a total loss of approximately \$39,000 of which the indebtedness to P.V.O. was a part, these findings are sufficient to determine petitioner's share of the loss in the joint venture and it becomes immaterial whether the other indebtedness of approximately \$17,000 was a further loss of the joint venture or was lost by Strategic Mineral in its mining venture. By the joint venture agreement petitioner's loss in such joint venture was limited to the loss of money borrowed from P.V.O. (i.e. \$22,229.37).

The enterprise in which the joint venture was engaged is clearly delineated in the letter to P.V.O. (Tr. 71-74) and was the buying and milling of chrome ore and the shipment and sale of chrome concentrates to the Metal Reserve stock pile in Sacramento. W. E. Otto testified on cross examination with respect to the amount owing P.V.O. at the termination of the joint venture as follows:

“A. Well, that was just figures of what we spent for ore and what we received in concentrates at the mill. That is what we got back, we were just that much short on the operation of the chrome mill.

Q. Was that the amount that was due to the Pacific Vegetable Oil Corporation on the date that you decided to terminate the venture?

A. Yes, sir, yes.

Q. In other words, if the venture had been terminated a few weeks earlier or a few weeks

later, the amount would undoubtedly have been different?

A. A few weeks earlier would have been lots less. We didn't have sense enough to terminate it quick enough, lets put it that way.

Q. Or if Pacific Vegetable Oil had extended a little more credit——

A. It would have been more.

Q. It would have been more?

A. That is right." (Tr. 42-43.)

This testimony, together with the letter to P.V.O. makes it clear that the joint venture had an ordinary net loss in the buying, milling and selling of chrome ore of at least the sum of \$22,229.37, which loss under the joint venture agreement was sustained by petitioner in the year 1943, the taxable year before this honorable Court.

Section 2797(a)(2) of the Internal Revenue Code defines a partnership as including a joint venture and Section 182 of said code provides:

"In computing the net income of each partner, he shall include, whether or not distribution is made to him—

* * *

(c) His distributive share of the ordinary net income or the *ordinary net loss* of the partnership, computed as provided in Sec. 183(b)." (Emphasis added.)

Sec. 183(b) I.R.C. provides for a segregation of capital gains or losses from ordinary net income or ordinary net loss and in no way impairs the right of

petitioner to deduct his distributive share of the ordinary net loss of the joint venture.

In conclusion on Issue 1 we submit that the decision of the Tax Court must be reversed and that this Honorable Court should declare that petitioner was entitled to deduct the sum of \$22,229.37 in its excess profits tax return for the year 1943 for the reason that said amount represents its distributive share of the ordinary net loss of its joint venture with Strategic Mineral.

ISSUE 2.

THE TAX COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT SUBSTITUTED COUNSEL TIME WITHIN WHICH TO PREPARE PETITIONER'S CASE.

This case was set for trial before the Tax Court on March 25, 1948 at 2 P.M. (Tr. 10-11). William B. Acton, general counsel for petitioner and of counsel for petitioner before this Honorable Court, but not admitted to practice before the Tax Court, discovered on the afternoon of March 24, 1948 that John L. Flynn who had assumed to sign the original petition to the Tax Court, as counsel for the petitioner, was not admitted to practice before that Court, and that he had not arranged for anyone admitted to practice before the Tax Court, to try petitioner's case (Tr. 11). Furthermore, said Flynn had answered for petitioner at the calling of the setting calendar on March 22, 1948. (Tr. 2, 12.) Mr. Acton immediately started a search for counsel admitted to the Tax Court to try

his client's case and contacted Mr. Haven, now of counsel for petitioner, who arranged with his partner, Mr. Janin, to try the case if employed. Employment of substituted counsel was accomplished during the morning of March 25, 1948, and Mr. Haven, who was then engaged in trial before the Tax Court, at 12:05 P.M. on March 25th, advised the Tax Court of the above facts and presented to the Tax Court the appearances of the substituted counsel and petitioner's motion for their substitution as its attorneys. Mr. Haven requested of the Tax Court that the case be continued until the next calendar so that it might be prepared for trial or in the alternative that it be continued for at least one day so that Mr. Janin might partially familiarize himself with the case. (Tr. 11-12.)

The Court replied to Mr. Haven's request as follows:

"I am sorry, I don't see how I could do anything other than call it just in order, because such a thing is inexcusable. I realize that your office had nothing to do with it, Mr. Haven, but we have to go ahead with it just as soon as we get to it." (Tr. 12.)

We believe that the foregoing action of the Tax Court was extremely arbitrary and constituted an abuse of discretion seriously impairing the right of petitioner to a fair hearing before the Tax Court.

It is true that the action of Mr. Flynn in signing the original petition as counsel for petitioner, in answering the setting calendar as counsel for peti-

tioner, when not admitted to practice before the Tax Court, was inexcusable. Further it was inexcusable on the part of Mr. Flynn, after representing to petitioner that he was qualified to appear in behalf of petitioner before the Tax Court by signing the petition to that Court as counsel, not to have immediately associated counsel qualified to present petitioner's case to that Court. But petitioner should not be deprived of a fair hearing because of the inexcusable action of Mr. Flynn. Petitioner was entitled to assume that when Mr. Flynn undertook to act as its counsel and continued to act as such, he was qualified to do so. Petitioner, as soon as it discovered the facts, acted promptly and could not be charged even with being negligent in the protection of its rights.

The very foundation of the American judicial system—a fair and full hearing—was attacked by the foregoing action of the Court. Proper action would have been to grant a sufficient continuance to permit substituted counsel to prepare for trial and if the Court desired to discipline anyone for having inconvenienced it, that discipline should have been by way of action against Mr. Flynn for assuming to act as a member of the bar of the Tax Court.

The foregoing action of the Tax Court compelled Mr. Janin to attend the 2 P.M. session of that Court on the day he was first employed, in order that he be present to proceed with petitioner's case as soon as the preceding case was concluded. The case was called for trial at 5:30 P.M. on that day. (Tr. 13.)

The books of account of Strategic Mineral containing the records of the joint venture were not found until after the opening of Court on March 26, 1948, at 9:30 A.M. (Tr. 29) and Mr. Janin had no opportunity to examine them until after the conclusion of the case at 10:50 A.M. on said day. (Tr. 54.)

The case was necessarily sketchily presented but we believe we were fortunate in proving all the facts essential to establish petitioner's right to deduct \$22,229.37 in its excess profits tax return for the year 1943. However, if this Honorable Court should conclude that petitioner has not fully sustained the onerous burden of proof required to overcome the inference of correctness of the Commissioner's determination as to any particular fact we urge that this case be remanded to the Tax Court for the taking of further evidence on that point because of the foregoing abuse of discretion of the Tax Court in refusing any continuance whatever to permit petitioner's substituted counsel to prepare for trial.

Dated, San Francisco, California,

April 1, 1949.

Respectfully submitted,

LOUIS JANIN,

HAROLD E. HAVEN,

WILLIAM B. ACTON,

Counsel for Petitioner

No. 12102

**In the United States Court of Appeals
for the Ninth Circuit**

JOE BALESTRIERI AND COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

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FILED

MAY 5 1948

PAUL P. O'BRIEN,

CLERK



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In the United States Court of Appeals for the Ninth Circuit

No. 12102

JOE BALESTRIERI AND COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum opinion of the Tax Court (R. 69-83) is unreported.

JURISDICTION

This petition for review (R. 86-92) involves federal excess profits taxes for the taxable year 1943. On October 8, 1946, the Commissioner of Internal Revenue mailed to the taxpayer notice of a deficiency in the total amount of \$25,021.70. (R. 5.) Within ninety days thereafter and on January 6, 1947, the taxpayer filed a petition with the Tax Court for a redetermination of that deficiency under the provisions of Section 272 of the Internal Revenue Code. (R. 4-8.) The decision of the Tax Court sustaining

the deficiency was entered August 3, 1948. (R. 84.) The case is brought to this Court by a petition for review filed November 1, 1948 (R. 86-92), pursuant to the provisions of Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTIONS PRESENTED

1. Where taxpayer agreed to "underwrite" any losses which another corporation might suffer as a result of discounting invoices of and lending money to a partnership, was taxpayer a mere guarantor for the debt of the partnership, as the Tax Court held, and therefore entitled to no deduction under Section 23 (f) of the Internal Revenue Code for the losses suffered since no payment in the taxable year of the obligation guaranteed has been shown?

2. If it should be held or assumed that the taxpayer became a participant in a joint venture with the partnership, as the taxpayer contends, has it proved the net loss of the venture for 1943 and its distributive share thereof, so as to be entitled to a deduction under Sections 182 (c) and 183 (b) of the Internal Revenue Code?

3. Did the Tax Court abuse its discretion where taxpayer's original counsel was found not to be admitted to practice before the Tax Court when it refused substituted counsel's request for more time to prepare his case for hearing?

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations may be found in the Appendix, *infra*.

STATEMENT

The facts as found by the Tax Court may be summarized as follows:

Petitioner is a California corporation, a wholesale dealer in fish. Its capital stock in the taxable year, 1943, was wholly owned by Joe Balestrieri, president of petitioner, and W. E. Otto, vice-president, and the members of their immediate families. Both were members of petitioner's board of directors. (R. 69-70.)

Early in the summer of 1943, a mining engineer, J. M. Hoff, approached Otto, in his individual capacity, with a proposition for the mining and milling of chrome ore. Thereafter, Otto introduced Hoff to Balestrieri, and, following conversations which convinced Otto and Balestrieri of the possibilities of very large profits, the three executed articles of co-partnership. (R. 54-56, 70.)

The agreement provided that each would have an equal interest and share of the profits in the partnership, the purpose of which was to engage "in the business of prospecting for, buying and selling mines and interests in mines, metals, strategic materials of all kinds and characters, and mining machinery and equipment, and to perform services in the nature of mining engineering." Hoff was to devote his full time to the carrying on of the business of the partnership. Balestrieri and Otto were to provide an office, travelling expenses for Hoff, and money with which to maintain himself for a period of six months.

Balestrieri and Otto were to be reimbursed for these

expenses. Shortly after the making of the agreement, a "Certificate of Co-Partners Transacting Business Under Fictitious Name"¹ was filed with the county clerk in San Francisco, certifying that the three were all members of the partnership. (R. 56-57, 70-71.)

Balestrieri and Otto had had dealings with the Pacific Vegetable Oil Corporation, hereinafter called Pacific, which Otto approached on behalf of the partnership to secure finances for operations. After a conversation with one of the officers of that corporation, Otto, on behalf of the partnership, wrote Pacific confirming a conversation wherein Pacific had agreed to finance "the purchase of Chrome ore and milling and the discounting of the invoices." (R. 71-72.) Pacific was to receive twenty-five percent of the net earnings of the partnership; when financing of operations by Pacific was no longer necessary, it was to receive ten percent of the partnership's net. Losses were to be covered by the partnership. (R. 73-74.)

Pacific indicated that it would agree to the proposition outlined by Otto, provided taxpayer's board of directors would agree to "underwrite" any loss which Pacific might sustain as a result of its discounting any invoices of the partnership. (R. 75.)

Thereupon Otto wrote taxpayer in behalf of the partnership (R. 75-76), offering—

a one-half participation in any profits that the Strategic Mineral Exploration Company [partnership] may earn. * * *

¹ Strategic Minerals Exploration Co.

The consideration for this offer is that your corporation agrees to guarantee the payment of any losses or deficits that may occur on the money borrowed from the Pacific Vegetable Oil Corporation on our chrome milling venture.

In the event that you decide to participate in this venture, please have your Board of Directors ratify same and formally confirm same to us in writing.

On July 26, 1943, the directors of taxpayer (Balestrieri and Otto) held a meeting, the minutes of which are in part as follows (R. 76-77):

2. The letter addressed to the corporation by the Strategic Mineral [sic] Exploration Company was submitted and the proposal to participate in one-fourth of the earnings of the Chrome Milling venture at Castella was accepted. The corporation in turn guaranteed any losses or deficits that may occur on money borrowed from the Pacific Vegetable Oil Corporation on the chrome [sic] milling venture.

3. It was ordered and directed that the president accept the offer.

4. * * * it was unanimously voted and approved to accept and confirm all the above.

A mistake was made in these minutes, prepared by a daughter of Balestrieri, in that the minutes referred to "one-fourth of the earnings of the Chrome Milling venture" instead of "one-half." (R. 77.)

On the same day taxpayer wrote to the partnership (R. 78) stating—

Please be advised that we herewith accept this proposal of yours to participate in the

profits of your chrome milling operation and we in turn guarantee any losses should they occur.

Taxpayer's board of directors having taken this action, Pacific consented to and did discount invoices of the partnership in accordance with the proposal noted. (R. 78.)

Before the end of 1943, the partnership had lost approximately \$39,000. The partners decided to cease operations and to liquidate the partnership business. Considerable bitterness developed between Balestrieri and Otto on the one hand and Hoff on the other. Hoff refused to assume any responsibility for the losses of the partnership and "walked out on" the other two. (R. 78-79.)

There was due to Pacific, on account of its dealing with the partnership, \$22,229.37. In 1943, taxpayer executed its note for that amount to Pacific, but payments thereon were not made by taxpayer until the following year. The other unpaid bills of the partnership, in the approximate sum of \$17,000, were paid gradually by Balestrieri and Otto. (R. 79.)

The Commissioner determined a deficiency in excess profits taxes for the year 1943 of \$25,021.71. The only error alleged below by taxpayer was the Commissioner's disallowance of the deduction of the loss of \$22,229.37, "resulting from a business venture between petitioner [taxpayer] and Strategic Mineral Exploration Co., a partnership." (R. 69.) The Tax Court on these facts found that taxpayer had entered not into a joint venture with the partnership but had

entered into a contract of guaranty, an ~~it~~ was therefore secondarily liable. Accordingly, no deduction could be allowed, taxpayer having failed to prove any payment in the taxable year which would give rise to any indebtedness to taxpayer on the part of the members of the partnership who were primarily liable on the obligation to Pacific, and, even if such an indebtedness had been created, there was no proof that it was worthless in the taxable year. (R. 69-83.)

Taxpayer appealed from this decision to this Court.

SUMMARY OF ARGUMENT

By California law, a guarantor is one who answers for the debt, default, or miscarriage of another. This is a secondary obligation, its effect to be interpreted in accord with the rules for interpretation of other contracts. The parties herein used the word "guarantee" extensively; while this is not conclusive, it is entitled to great weight in determining the intentions of the parties to the agreement in question. The use of words of guaranty coupled with evidence adduced at the hearing sustains the Tax Court's conclusion that taxpayer entered into an agreement of guaranty.

Taxpayer's argument that there can be no guaranty where the promise is made to the principal debtor is illogical, and depends upon constructions of the Statute of Frauds which is not involved. Taxpayer's promise was to answer for the debt of someone other than itself and therefore comes within the statutory definition.

In any event, in substance the promise of guaranty was to Pacific. The real consideration moved to Pacific and from it. In reliance upon the contract of guaranty, Pacific advanced funds to the partnership.

Where there is nothing but an agreement to share profit and loss, assuming that the agreement is not a guaranty, it cannot be considered a joint venture, because there is no joint carrying on of a business by joint venturers within the applicable Regulations or in accord with other harmonious authorities.

The sums advanced were not advanced to taxpayer but to the partnership, in reliance upon the guaranty. This does not constitute a loan to the guarantor.

Taxpayer, being on the cash receipts and disbursements basis of accounting for federal income tax purposes, cannot claim a loss deduction on the guaranty agreement where no payment was made in the taxable year.

Even assuming the taxpayer was a participant in a joint venture, there is no showing in the record that the joint venture suffered a loss in 1943, so as to entitle taxpayer to deduct his distributive share thereof in 1943.

The Tax Court did not abuse its discretion in denying the request of taxpayer's counsel for more time in which to prepare taxpayer's case. Counsel had sufficient time in which to prepare for a hearing, although the time allowed was not extensive. In any event, the denial was not prejudicial, since ample evidence was adduced to fairly present the issues.

ARGUMENT

I

Taxpayer was a guarantor of the partnership's obligation to Pacific on the milling venture, and sustained no deductible loss in the taxable year since no payment was made in that year on the guaranty, a secondary obligation

The Tax Court found that taxpayer was but a guarantor of the liabilities of the partnership to Pacific, with the secondary liability incident to a guaranty. Accordingly, taxpayer who reported on the cash receipts and disbursements basis of accounting (R. 69) was allowed no deduction for its payments of the amounts due Pacific within Section 23 (f) of the Internal Revenue Code (Appendix, *infra*), since it failed to prove any payment in the taxable year of the obligation guaranteed. Moreover, assuming that as a result of payments made on the guarantee an indebtedness was shown to have arisen, there was no proof that the indebtedness of the three partners to taxpayer became worthless in 1943, the taxable year, so as to merit deduction under Section 23 (k) (1) of the Internal Revenue Code (Appendix, *infra*). Taxpayer pitches his case on the theory that the agreement it entered into was an agreement of joint venture, constituting taxpayer one of two joint venturers with the partnership and that accordingly since the venture sustained a loss in the taxable year, taxpayer, as one of the venturers, was entitled to deduct its distributive share of the loss under Section 182 (c) of the Internal Revenue Code (Appendix, *infra*), joint ventures being classified for tax

purposes with partnerships under Section 3797 (a) (2) of the Internal Revenue Code (Appendix, *infra*).

It is our position that (1) the evidence fully sustains the Tax Court's finding that the taxpayer merely guaranteed payment of the partnership's debt to Pacific, but (2) even assuming that the taxpayer became a joint venturer in the partnership's business, it still is not entitled to deduct the claimed loss because the "venture" is not shown to have sustained a loss in 1943 within the meaning of Sections 182 and 183 of the Internal Revenue Code.

Whatever the agreement in question is to be termed, it was made in California, and it is therefore pertinent to examine California law on the subject.

By legislation, California has abolished the distinction which has gained favor in many American jurisdictions between guaranty and suretyship. California Civil Code, Section 2787 (Appendix, *infra*), further provides that—

A surety or guarantor is one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor.

This is consistent with the earlier California definition of a guaranty, found in *Lightstone v. Laurencel*, 4 Cal. 277, where the court held that a guarantor or indorser is one—

who undertakes for the obligation of another, taking upon himself the fulfillment thereof, in case of the non-compliance of the party contracting.

A similar definition later was adopted by statute. Prior to 1939 a guaranty, as opposed to a suretyship, was a "promise to answer for the debt, default, or miscarriage of another person." See California Civil Code, Section 2787 (Deering, 1937). Most of the former sections dealing with guaranty are retained subsequent to 1939, their amendment if any made to conform them to the amended terminology set out in Section 2787. The basic abolition that took place in 1939 was of what formerly had been deemed suretyship. Although the Civil Code now speaks of suretyship where formerly it used the term guaranty, it is obvious that prior constructions will control where amendment is only the slight change of terminology. Accordingly, the question of whether there is a guaranty or an original promise, a secondary as opposed to a primary liability, is essentially one of fact; interpretation of a written contract is a question for the court. *Harris v. Frank*, 81 Cal. 280, 286, 22 Pac. 856, 858; see *Ingalls v. Bell*, 43 Cal. App. 2d 356, 366-368, 110 P. 2d 1068, 1074-1076; 2 Williston on Contracts, Sec. 465; cf. *Kilbride v. Moss*, 113 Cal. 432, 45 Pac. 812. Section 2837 of the Civil Code provides that a contract of surety, and therefore a guaranty agreement, is to be interpreted under the same rules as apply to the construction of other contracts. As the California Supreme Court has said in *Everts v. Matteson*, 21 Cal. 2d 437, 448, 132 P. 2d 476, 483—

the terms of the instrument and the circumstances under which it was made determine the character and extent of the undertaking.

* * * The contract will be fairly construed to effect the object for which it was given and to accomplish the purpose for which it was designed * * *, and the use of the word "guaranty" in the instrument is not conclusive in determining its character.

It is clear, however, that use of the word "guaranty" or "guarantee" is entitled to great weight as evidence of what the parties intended.

A classification of the agreement made by taxpayer herein is made difficult by the fact that the agreement was made by laymen without regard for legal refinements. Nevertheless, the Tax Court's conclusion that what is involved is a guaranty seems the logical conclusion.

In the correspondence between taxpayer and the partnership and in the minutes of the meeting of taxpayer's directors, the word "guarantee" was used exclusively in referring to taxpayer's obligation. (R. 75-78.) Although not conclusive, the use of the word is important, particularly in view of the fact that the agreement was made after Pacific indicated it would loan money to the partnership if taxpayer would agree to "underwrite" any loss. (R. 75.) Both words connote a collateral, insuring agreement, particularly where applied to a prospective debt of another than the guarantor or underwriter.

It is pertinent to emphasize that the agreement was made at the insistence of Pacific, which believed the partnership a poor credit risk. To procure a guaranty of its credit, the partnership sought out taxpayer, offered it what the partnership thought a

“very liberal” (R. 27) right of profit-participation in return for a guaranty. Not only did the written agreement refer to the arrangement as a guaranty by taxpayer in consideration of a percentage of the profits earned by the partnership, but Otto emphasized in his testimony that the arrangement was intended as a guaranty. Thus he testified that Rocca of Pacific insisted upon a guarantee by taxpayer (R. 37); accordingly, a guarantee or guaranty was sought. The guaranty was for the protection of Pacific. (R. 37-38.) The protection Pacific demanded was tendered for the purpose of enabling the *partnership* to borrow money. (R. 39, 41.) Taxpayer was to “stand behind the deal for us.” (R. 42.) “The money was loaned to the partnership, and then in turn was guaranteed by Balestrieri and Company.” (R. 43.) It is not without significance that one of the purposes of the agreement was the accommodation of the partnership. (R. 45, 46-47.) And Balestrieri testified that the guaranty was to apply to money borrowed from Pacific, “to guarantee they would be paid back” (R. 49), the basic purpose of the normal guaranty.

These facts bear out the Tax Court’s conclusion that taxpayer intended to be and was a guarantor. Taxpayer argues that the contract cannot be a guaranty because it was made between the principal debtor and the guarantor. The base upon which his argument is bottomed is that a promise to answer for the miscarriage of another must be a promise to the creditor, and that therefore a promise to the principal

debtor must be something else than a guaranty. It is clear that a promise to the debtor is not within the Statute of Frauds. *Garroway v. Jennings*, 189 Cal. 97, 207 Pac. 554. Therein the promisor contracted to pay the creditors of the debtor in consideration of an assignment of debtor's judgment to him. The court held there was involved an original promise within Section 2794 of the California Civil Code which was therefore not required to be in writing under Section 2793. Accord: Restatement, Contracts, Section 180, Illustration (9). But this case does not involve the question of whether the agreement to answer for the debt of the partnership was enforceable under the Statute of Frauds. Moreover, the rule noted immediately above is a result of constructions of the Statute with a mind to the evils it sought to correct.² Here the taxpayer recognized its obligation, which in any event was in writing.

The mere fact, even if true, that the promise to guarantee the partnership's debt was made only to the partnership is irrelevant here. Regardless of the promise, the contract is for the benefit of the creditor directly or indirectly. This is particularly in point

² The principal evil has been the ease with which creditors had been able to prove by false testimony that credit was given in consideration of a guaranteeing agreement. C could easily prove the debt of P; false testimony was used to prove that G had promised to guarantee P's debt. The evil practices could occur only where the creditor was the promisee or claimed to be. Therefore, the courts concluded that a promise to the principal debtor was not within the Statute, although it is a valid, binding agreement. Arant, Suretyship, Section 32. See 2 Williston on Contracts (Rev. ed., 1936), Sections 460, 461.

in the case at bar, where the creditor would not in fact have made advances to the partnership unless it was protected by the guaranty of taxpayer. (R. 23.) Even assuming that in form, the promise was made to the partnership, the principal debtor, the consideration certainly flowed to the creditor, Pacific. And certainly Pacific's action in reliance on the guaranty is sufficient acceptance by it of the guaranty agreement. Indeed, in any event, it seems a required conclusion that the promise was in fact made to Pacific, although the letter of acceptance of the offer of the partnership to taxpayer to participate in the profits in return for the guaranty was addressed to the partnership. All the parties concerned knew that the letter would be the basis of an agreement with Pacific under which it would loan the partnership money and it subsequently was such a basis. The only logical conclusion is that in substance the guaranty was to Pacific. If the contract was one of guaranty, or was not solely because made to the partnership alone, it was still a contract whereby the partnership was benefited by enabling it to incur debts. For if the contract was one of guaranty, or was not solely because made to the partnership, it seems eminently clear that taxpayer had a right of reimbursement from the partners. In this connection, it may be pointed out that it is highly doubtful that taxpayer, controlled by Otto and Balestrieri, would wish by their guaranteeing agreement to release Hoff from obligation to repay. The presence of Hoff in the partnership lends considerable weight to the Tax

Court's finding that the intention was that taxpayer would guarantee its credit. It is true that the partnership was aided by the guaranty, as is any guaranteed debtor. But the real consideration moved to and from Pacific. In substance, the promise of guaranty was to Pacific.

Taxpayer contends that the agreement constituted an agreement of joint venture between taxpayer and the partnership. The authorities do not bear out such a conclusion. A joint venture is very similar to a partnership, and is considered a partnership for tax purposes under Section 3797 (a) (2) of the Internal Revenue Code, *supra*. It is implicit in both the statute and Section 29.3797-4 of Treasury Regulations 111 (Appendix, *infra*) that a joint venture is an association of persons to carry on a business or financial venture or operation. A further essential requirement is a joint management and control. *Tompkins v. Commissioner*, 97 F. 2d 396 (C. A. 4th). This concept of a joint venture is also the rule generally and in California. *Porter v. Cooke*, 127 F. 2d 853 (C. A. 5th), certiorari denied, 317 U. S. 670, rehearing denied, 317 U. S. 710; *Chisholm v. Gilmer*, 81 F. 2d 120 (C. A. 4th), affirmed, 299 U. S. 99; *Nelson v. Abraham*, 29 Cal. 2d 745, 177 P. 2d 931; *Spier v. Lang*, 4 Cal. 2d 711, 53 P. 2d 138; *Howard v. Societa di Unione, etc., Italiana*, 62 Cal. App. 2d 842, 145 P. 2d 694; *Wallace v. Pacific Electric Ry. Co.*, 105 Cal. App. 664, 288 Pac. 834; *Brenner v. Plitt*, 182 Md. 348, 34 A. 2d 843; *Griffiths v. Von Herberg*, 99 Wash. 235, 169 Pac. 587.

In this case there is at most an agreement by taxpayer to underwrite a particular obligation of the partnership in return for a stated percentage of its profits. There is no association of corporation and partnership to "carry on" a business, operation, or venture, no joint participation. In this connection it is significant that neither witness testified that a joint venture was formed. Taxpayer contends that there is common management. There is common management of the taxpayer and the partnership, but there is no common management of a venture by the taxpayer and the partnership. There is no evidence in the record that taxpayer as a corporation participated in the operations of the milling venture. It is true that Otto and Balestrieri as two of the three partners were also controlling stockholders of the taxpayer, but there is no evidence to indicate that they were authorized to bind the taxpayer as a participant in the chrome milling venture except in respect of the money advanced by Pacific. There is no evidence that the partnership could bind the taxpayer in other contracts or that the taxpayer entered into others or into the management of the venture. If contrary to the proper rule (*Moline Properties, Inc. v. Commissioner*, 319 U. S. 436) the corporate entity of taxpayer is disregarded to permit the conclusion that the actions of Otto and Balestrieri are to be deemed to have been taken both as partners and on behalf of the taxpayer corporation as a joint venturer, it is only logical to conclude that Otto and Balestrieri did not contract with themselves as cor-

poration with partners, but as partners pledged the assets of the corporation to secure loans from Pacific. This, however, does not make the taxpayer corporation a joint venturer. The weakness of taxpayer's argument as to common control is shown clearly when it is considered that taxpayer is bound on the agreement; had Otto and Balestrieri sold out their interests in taxpayer, it would still be bound and any semblance of common control would have evaporated. If there were a real joint venture, the mere change of stock holdings in the corporation could not change its status as a joint venturer. One of the salient features of a corporation is, after all, its ability to continue as an entity despite changes in its stock ownership.³

Taxpayer argues (Br. 15) that taxpayer was "in substance, the real borrower of the money." In this connection it relies on *Garroway v. Jennings, supra*. But that case is distinguishable in that all consideration moved as between the principal debtor and the guaranteeing promisor. Herein the creditor agreed to loan money to the principal debtor, the partnership, in reliance on taxpayer's promise of guaranty. This was not in substance a loan to taxpayer. It was a loan to the partnership which was to and did use the money in furtherance of its chrome milling venture. An

³ It may be noted that the record shows no filing of a partnership information return under Section 187 of the Code for the taxable year, either by the partnership or by the partnership and taxpayer as joint venturers. This may be an indication that no joint venture was intended. Cf. *Rota-Cone Oil Field Op. Co. v. Commissioner*, 171 F. 2d 219 (C. A. 10th).

examination of substance reveals not only a loan to the partnership but a guaranty to Pacific. Furthermore, Otto testified that the money was lent to the partnership. (R. 43. Cf. Balestrieri testimony, R. 47, 49.)

Taxpayer reported its income for the year 1943 on the cash receipts and disbursements basis for federal income and excess profits tax purposes. Taxpayer gave its note for the amounts due Pacific in November of that year but the Tax Court found (R. 79) that no payments were made on the note in 1943.⁴ It is well established that where a taxpayer is on the cash basis, he may not take a deduction for loss upon a contract of guaranty unless he actually makes payment under this guaranty. The giving of a note, moreover, is not the equivalent of cash so as to entitle a cash basis taxpayer to claim a payment. *Helvering v. Price*, 309 U. S. 409; *Eckert v. Burnet*, 283 U. S. 140; *Jenkins v. Bitgood*, 101 F. 2d 17 (C. A. 2d), certiorari denied, 307 U. S. 636; 2 Mertens, Law of Federal Income Taxation, Sections 28.70, 28.71. Even assuming that taxpayer contracted to pay all losses, payment still is necessary to entitle a cash basis taxpayer to a deduction.

Accordingly, it follows that taxpayer cannot claim a deduction for its obligation to Pacific, since nothing was paid on the obligation in the taxable year. Moreover, as the Tax Court pointed out, there is no evidence that taxpayer's right of reimbursement on its

⁴ It was conceded at the hearing that if any payments were made in 1943, they were trivial (R. 16, 52).

liability on the guaranty became worthless in the taxable year so as to sustain a bad debt deduction.

II

Even assuming the taxpayer was a member of a joint venture, it is not shown to be entitled to deduct a loss under Section 182 of the Code

Taxpayer claims the right to deduct the amount of \$22,229.37 under Section 182 (c) of the Internal Revenue Code (Appendix, *infra*) which allows a partner to deduct his distributive share of the ordinary net loss of the partnership, computed as in Section 183 (b). Section 183 (a) (Appendix *infra*) provides that the net income of the partnership shall be computed in the same manner and on the same basis as in the case of an individual, and Section 183 (b) (2) (B) (Appendix, *infra*) provides that after segregating gains and losses from sales or exchanges of capital assets, the ordinary net loss shall consist of the excess of the deductions over the gross income. Thus, even assuming *arguendo* that the taxpayer became a member of a joint venture in 1943, which as already shown is treated as a partnership for tax purposes, its right to a deduction under Section 182 (c) depends on its having established the partnership's excess of deductions over gross income and its distributive share of that excess.

There is nothing in the record to show what deductions and income the joint venture had for 1943, what its loss if any was, and what the taxpayer's

distributive share was.⁵ As stated (fn. 3, *supra*), the joint venture apparently filed no return for that year. In any case, it is clear that the amount borrowed from Pacific would not be an allowable deduction to the joint venture by virtue of the obligation to repay it. No section of the Internal Revenue Code permits a deduction merely because borrowed money has to be repaid. No other basis for allowing the venture to deduct the borrowed money has been suggested. (Cf. R. 39-40.) It follows that because the amount borrowed does not represent an allowable deduction to the joint venture in 1943 and because distribution of its loss if any for that year was not otherwise shown, the taxpayer is not entitled to any deductions under Section 182 (c) in 1943.

III

The Tax Court did not abuse its discretion in denying the request of taxpayer's counsel for additional time to prepare his case

It is perhaps unfortunate that the counsel taxpayer first procured failed it at the last moment. Nevertheless, we feel that the Tax Court did not abuse its discretion in denying the request of taxpayer's counsel for more time to prepare his case and we feel, moreover, that even if there were an abuse, it was not

⁵ The books for the partnership composed of Otto, Balestrieri and Hoff were in court at the hearing but were not introduced in evidence (R. 29-30). From this book Otto testified only that the closing balance due Pacific was \$22,229.37. There was no evidence as to the amount of the loss shown by these books, if any, on the milling venture.

prejudicial. (The discussion between taxpayer's counsel and the court is found at pp. 11-12 of the record.)

It appears from the discussion between counsel and the court that Mr. Janin had a full day to work on preparation. He was notified on the morning of the hearing day that he would definitely have the case to present. The hearing commenced at 5:30 p. m. Counsel's colleague pointed out between 12:05 and 12:10 that Mr. Janin had already been working on the case. He had been notified the day before that he might have to present the case. Moreover, the afternoon session on March 25, which was the day of definite notification of Mr. Janin's pending task, lasted only twenty minutes, leaving counsel a full evening before the next day's session.⁶

Taxpayer's counsel may have endured some hardship in preparing his case in the time available. It may have been inconvenient to work at night. But the issue involved does not seem so difficult that the time available for preparation was insufficient. It is submitted that the Tax Court did not abuse its discretion. Had it postponed the trial the inconvenience to court and counsel for the Commissioner might have been equal to whatever inconvenience was caused to counsel for taxpayer.

Taxpayer's main complaint in regard to the court's refusal to extend time to counsel was that taxpayer

⁶ Taxpayer states in his brief that Mr. Janin was compelled to attend the 2:00 p. m. session of court on March 25. This is not borne out by the record which shows that at 12:10 p. m. the court adjourned until 5:30 p. m. (R. 13.)

was denied a fair and full hearing. This is not borne out by the record, which shows certainly a fair hearing and also that ample evidence was introduced by taxpayer fairly to present the issues. Indeed, it is to be noted in this connection that the taxpayer has not referred to any additional material evidence not known to counsel at the time of the hearing which would change the result if now introduced into the record. It would seem then that the Tax Court's action was not prejudicial.

CONCLUSION

The Tax Court's decision, being in accord with established legal principals and amply substantiated by the evidence, is not clearly erroneous and should be affirmed.

Respectfully submitted.

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MAY 1949.

APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * *

(f) *Loss by corporations.*—In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

* * * *

(k) *Bad debts.*—

(1) *General rule.*—Debts which become worthless within the taxable year; * * *

* * * *

(26 U. S. C. 1946 ed., Sec. 23.)

SEC. 182. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

* * * *

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183

(b). (26 U. S. C. 1946 ed., Sec. 182.)

SEC. 183. COMPUTATION OF PARTNERSHIP INCOME.

(a) *General rule.*—The net income of the partnership shall be computed in the same manner and on the same basis as in the case of an individual, except as provided in subsections (b) and (c).

(b) [As amended by Section 150 (g) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Segregation of items.*—

(1) *Capital gains and losses*.—There shall be segregated the gains and losses from sales or exchanges of capital assets.

(2) *Ordinary net income or loss*.—After excluding all items of gain and loss from sales or exchanges of capital assets, there shall be computed—

(A) An ordinary net income which shall consist of the excess of the gross income over the deductions; or

(B) An ordinary net loss which shall consist of the excess of the deductions over the gross income.

* * * * *

(26 U. S. C. 1946 ed., Sec. 182.)

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

(2) *Partnership and partner*.—The term “partnership” includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term “partner” includes a member in such a syndicate, group, pool, joint venture, or organization.

* * * * *

(26 U. S. C. 1946 ed., Sec. 3797.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.3797-4. *Partnerships*.—The Internal Revenue Code provides its own concept of a partnership. Under the term “partnership” it includes not only a partnership as known at common law, but, as well, a syndicate, group, pool, joint venture, or other unincorporated

organization which carries on any business, financial operation, or venture, and which is not, within the meaning of the Code, a trust, estate, or a corporation. On the other hand the Code classifies under the term "corporation" an association or joint-stock company, the members of which may be subject to the personal liability of partners. If an organization is not interrupted by the death of a member or by a change in ownership of a participating interest during the agreed period of its existence, and its management is centralized in one or more persons in their representative capacities, such an organization is an association, taxable as a corporation. As to the characteristics of an association, see also sections 29.3797-2 and 29.3797-3. The following examples will illustrate some phases of these distinctions:

(1) If A and B buy some acreage for the purpose of subdivision, they are joint adventurers, and the joint venture is classified by the Code as a partnership.

(2) A, B, and C contribute \$10,000 each for the purpose of buying and selling real estate. If A, B, C, or D, an outside party (or any combination of them as long as the approval of each participant is not required for syndicate action), takes control of the money, property, and business of the enterprise, and the syndicate is not terminated on the death of any of the participants, the syndicate is classified as an association.

California Civil Code:

SEC. 2787. *Sureties, guarantors, distinction abolished—definition.*—[11] The distinction between sureties and guarantors is hereby abolished. The terms and their derivatives, wherever used in this code or in any other statute or law of this State now in force or hereafter enacted, shall have the same meaning, as here-

after in this section defined. A surety or guarantor is one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor. Guaranties of collection and continuing guaranties are forms of suretyship obligations, and except in so far as necessary in order to give effect to provisions specially relating thereto, shall be subject to all provisions of law relating to suretyships in general.

No. 12,102

IN THE
United States Court of Appeals
For the Ninth Circuit

JOE BALESTRIERI AND COMPANY,	}
<i>Petitioner,</i>	
VS.	
COMMISSIONER OF INTERNAL REVENUE,	}
<i>Respondent.</i>	

REPLY BRIEF FOR PETITIONER.

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FILED

MAY 16 1949

PAUL P. O'BRIEN,
CLERK

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REPLY BRIEF FOR PETITIONER.

PRELIMINARY STATEMENT.

The respondent's brief in this matter was served upon counsel for the petitioner on May 5, and as the 10th day thereafter falls upon a Sunday, petitioner's time for filing its brief expires on Monday, May 16.

I.

THE RESPONDENT'S ARGUMENT THAT PETITIONER WAS A GUARANTOR OF THE PARTNERSHIP'S OBLIGATION TO PACIFIC VEGETABLE OIL CORPORATION ON THE MILLING VENTURE. (R.B. pp. 9-20.)

The respondent now tacitly concedes in the heading of his argument and in the context thereof on page 9 of his brief, what the Tax Court wholly failed to find,

despite the uncontradicted and unimpeached evidence presented to it, that is, that there was a separate milling venture distinct and apart from the partnership's mining operations. The respondent's position now is that there was such a venture, but that the petitioner corporation was not a participant therein, despite the fact that it was to have 50% of the net profits of that venture.

No fault can be found with respondent's statements of the history of the statutory provisions in California with respect to guaranty and suretyship, and the general legal propositions set forth in the early portion of his argument on pages 10 to 12 of his brief. However it is impossible to understand how the respondent reaches the conclusion that he does, reasoning from the law as applied to the documents and other evidence involved in this case.

Thus after admitting that the word "guaranty" is ambiguous and may mean many different things, he states without any authority whatsoever (Br. p. 12) "It is clear, however, that the use of the word 'guaranty' or 'guarantee' is entitled to great weight as evidence of what the parties intended".

The respondent further admits that interpretation of the agreement is difficult because made by laymen without regard for legal refinements. The testimony of W. E. Otto on the matter, however, is clear and explicit:

"I explained to Pacific Vegetable Oil the proposition. He said, 'Reduce it to writing and I will consider it.'

I did submit it to him, myself, on behalf of the partnership, and his reply after that was that he would go along with the deal, provided that we'd have the meeting of the Board of Directors of the fish corporation agree to underwrite, or absorb, any loss that might occur. We never thought there could possibly be any loss, we thought it was a bonanza in our lap rather than possible loss." (Tr. 25.)

And again:

"We offered Joe Balestrieri, the partnership offered Joe Balestrieri and Company one-half participation in the earnings of that venture, which we thought was very liberal, and in exchange for that they were to *guarantee us* for any losses that might occur on the venture." (Emphasis supplied.)

"Q. What do you mean by the word 'guarantee'?"

"A. Well, if we ran into difficulties and ran into a loss, they would absorb any loss that might occur.

Q. In other words, the agreements of the petitioner corporation related only to the milling venture?"

A. That was the reimbursement, that's right." (Tr. 27.)

* * * * *

"* * * They accepted the proposal, and in consideration of the 50 per cent participation that they would have in the profit, that they would absorb any losses that might occur." (Tr. 28.)

Both of the witnesses showed more than a customary ignorance of technical legal meanings of words

used by them in their testimony. It is obvious from their grammar that neither has had the advantage of extensive education, although the broken English used by Mr. Balestrieri in his testimony is not fully reflected in the transcript.

The testimony of the witnesses is confirmed by the agreement itself and by the circumstances surrounding it in the following particulars:

1. The agreement was not made with the creditor but with the party seeking credit.

2. The venture was regarded as a bonanza, and yet 50% of the net profits was to be given the petitioner corporation.

3. The language used in the agreement supports the testimony. The letter to petitioner (Tr. 75) is headed:

“Offer to *participate* in profits of Chrome Milling Operation to be handled by this partnership in consideration of guaranteeing *venture*.”

And the letter concludes (Tr. 76):

“In the event you decide to *participate in this venture*, please have your Board of Directors ratify same and formally confirm same to us in writing.”

Similarly, in the minutes of the petitioner corporation, the following language appears (Tr. 77):

“* * * the proposal to participate in one-fourth (sic) of the earnings of the Chrome Milling venture at Castella was accepted. The corporation in turn guaranteed any losses or deficits that may occur on money borrowed from the Pacific

Vegetable Oil Corporation on the chrome (sic) milling venture. * * *”

And the final document involved (Tr. 78) refers to “our participation in your Chrome Milling Venture,” and further states:

“* * * We herewith accept this proposal of yours to participate in the profits of your chrome milling operation and we in turn guarantee any losses should they occur.”

On the first point above noted, the respondent pays no attention to the fact that a contract of guaranty must be between the guarantor and the creditor, and at least normally requires a delivery to and acceptance by the creditor.

24 *Am. Jur.* 899-900.

The agreement herein made was not with the creditor and is not couched in the ordinary terms of a contract of guaranty. The loss which petitioner “guaranteed” was not limited to the loss which Pacific Vegetable Oil might otherwise incur—because of the principal’s inability to pay—but the entire loss on the milling venture (which was to be entirely financed by Pacific Vegetable Oil). Under the language of the agreement, if the partnership made a profit on its mining venture that profit could not be used to off-set any loss sustained on the milling venture, thereby reducing petitioner’s obligations, but such loss was to be petitioner’s entirely and exclusively.

The respondent wholly misses the point of the cases and other authorities cited by petitioner on pages 12

to 15 of petitioner's opening brief. These cases establish that the contract containing the promise from petitioner to the partnership, would, even if entirely oral, be outside the statute of frauds and make petitioner liable as principal, to the partnership and, incidentally, to Pacific Vegetable Oil Corporation. Being liable as principal, it was not a guarantor.

As against this point the respondent's only argument is the circuitous one that because the ambiguous word "guaranty" was used in the agreement, what was meant was a strictly legal guaranty, and the further proposition that Pacific Vegetable Oil would not have financed the venture had petitioner's credit not been available to it. As noted in petitioner's opening brief, however, Pacific Vegetable Oil had greater protection with the petitioner as a principal obligor than as a guarantor.

The limitation of the agreement to one of guaranty for the benefit of Pacific Vegetable Oil is inconsistent with the basic circumstances. The parties fully anticipated to make very large profits from the venture. The petitioner was to have 50% of those profits and Pacific Vegetable Oil was to have 25% for a limited period. Thus the petitioner corporation had a far greater interest in the profits of the venture than did the three members of the partnership. Respondent contends that each one of the three who had an $8\frac{1}{3}\%$ interest in the profits comprised the sole joint venturers and would eliminate the entity which had 50%. An agreement to absorb all of the losses of the venture is very much more in accord with a 50% interest in

the profits than is an agreement of guaranty to a third person.

Respondent's argument on pages 13 to 16 is exceedingly circuitous, and essentially assumes that a true guaranty was intended and made. The respondent makes no answer to the petitioner's authorities establishing that the agreement in question had been made with the partnership rather than with Pacific Vegetable Oil.

It should perhaps be emphasized that petitioner at all times treated the transaction as an agreement to absorb the losses on the milling venture. It reported the loss on its tax return, and recognized the direct obligation to Pacific Vegetable Oil Corporation, making payments thereon, principally in years subsequent to the taxable year here involved. No effort at any time was made by either the petitioner or Pacific Vegetable Oil Corporation to collect from the other participants.

Commencing on page 16 the respondent argues that there was no joint venture between the petitioner corporation and the partnership with respect to the milling operations. However, it is well established that the essence of a joint venture is the agreement of the parties with respect to a particular undertaking specifying the manner in which the profits and losses as between themselves shall be borne, and a presumption arises from the sharing of profits that a joint venture is made. The petitioner has throughout its proceeding referred to the agreement as one creating a joint venture, because of the limited nature of the

undertaking and the limited operations period contemplated; in some respects, because a continuity of transactions was contemplated it is possible that the term "partnership" is more clearly applicable. The difference is purely one of degree.

As stated in petitioner's brief (p. 19) the petitioner's contribution was in the nature of a capital contribution and as under the offer of Pacific Vegetable Oil, it was to entirely finance the venture; petitioner's agreement to absorb any losses that might occur, in substance made the petitioner the borrower from Pacific Vegetable Oil and its contribution in substance the entire capital of the venture.

The respondent makes a great deal of the fact that petitioner independently of its two officer shareholders had no control over the venture. This contention is utterly ridiculous, because the two officer shareholders were in control of the partnership as well as in complete control of petitioner. It is true, as stated on page 17 of respondent's brief that the authorization granted to the partnership was only with respect to this venture, and petitioner's officers were not at any time authorized by the petitioner to enter into any other ventures. If the ownership of petitioner were to be changed, the petitioner would remain sufficiently in control and management to terminate the joint venture.

The remainder of the respondent's argument on this point assumes the respondent's conclusion that the petitioner was not a participant in the venture but

was a mere guarantor to Pacific Vegetable Oil Corporation.

II.

THE RESPONDENT'S ARGUMENT THAT EVEN ASSUMING THAT THE TAXPAYER WAS A MEMBER OF A JOINT VENTURE IT IS NOT SHOWN TO BE ENTITLED TO DEDUCT A LOSS UNDER SECTION 182 OF THE CODE.

The respondent's argument under this heading is somewhat confusing because it entirely ignores the agreement between the parties, a portion of which consists of the letter addressed to Pacific Vegetable Oil Corporation. Under that agreement Pacific Vegetable Oil Corporation was to entirely and exclusively finance the operation of the joint venture, in the purchase, transportation, milling and sale of chrome ore. There is no question but what any loss sustained in this activity would be an ordinary operating loss of the venture and no issue was raised with respect thereto in the deficiency notice or otherwise.

Similarly, the loss which petitioner agreed to assume was solely in connection with the financing of the milling venture by Pacific Vegetable Oil Corporation. If any greater loss existed it was not that of the petitioner and the only way a greater loss could have been sustained was if the individuals interested in the partnership, or the partnership itself, supplied additional capital. The respondent now assumes wholly without evidence, and contrary to the testimony of Mr. Otto (Tr. 30, 42-43) and of Mr. Balestrieri (Tr. 47), that

the amount of the loss was not established. In this testimony the amount of the loss of \$22,229.37 was not only established, but the way in which the loss arose was also confirmed as being in accordance with the agreement.

III.

THE RESPONDENT'S ARGUMENT THAT THE TAX COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE REQUEST OF TAXPAYER'S COUNSEL FOR ADDITIONAL TIME TO PREPARE HIS CASE.

The respondent's argument on this issue is deserving of very little recognition, particularly in view of the statements made in other portions of his brief as to the inadequacy of the evidence on the pertinent issues. On page 22 of the brief, respondent makes a point of the facts that the hearing did not commence until 5:30 p.m., but does not point out that the petitioner's counsel was required to be in Court and ready to proceed at any minute during the course of the day in question, and consequently did not have that day available to examine books and records and interview witnesses.

Petitioner's counsel is aware of the numerous instances in which the testimony adduced could have been fortified and strengthened in this proceeding and believes very strongly that had a little greater preparatory time been allotted the Tax Court would never have found (what respondent now concedes to be erroneously found) that the testimony of petitioner's

witnesses was inconsistent with the known facts. Sketchy though the evidence is in certain particulars, petitioner nevertheless believes that it is adequate and establishes petitioner's right to the deduction claimed.

CONCLUSION.

The Tax Court's decision being contrary to established legal principles, and to the evidence adduced, is clearly erroneous and should be reversed.

Dated, San Francisco, California,
May 16, 1949.

Respectfully submitted,

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